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VOLUME IX

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VOLUME IX  
MAGISTERIAL PRACTICE  
PARTNERSHIP PRACTICE  
PROBATE PRACTICE

THE NEW ERA PUBLISHING CO. LTD.  
12 & 14 NEWTON STREET, HOLBORN, LONDON, W.C.2

# MAGISTERIAL PRACTICE

BY

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<i>First Edition</i>	.	.	1935
<i>Reprinted</i>	.	.	1936
„	.	.	1938



## PREFACE

IN this section of the Solicitors Office Library I have endeavoured to set out the chief matters in relation to courts of summary jurisdiction with which the young solicitor or the solicitor's clerk ought to be familiar and I trust that even the more experienced police court solicitor will find the section useful as a reminder of points which he may have forgotten.

F. T. G.



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# MAGISTERIAL PRACTICE

## CHAPTER I

### POLICE COURT ADVOCACY

ONE of the most remarkable features of the development of our legal system in the last thirty years has been the steadily rising importance of the summary courts. The number of indictable offences which the magistrates are allowed to try if the defendant consents was very greatly increased by the Criminal Justice Act, 1925, and many Acts of Parliament have been passed in recent years making serious offences triable either summarily or upon indictment, the choice of procedure being very largely left to the discretion of the magistrates.

A still more significant development may be seen in the Adoption of Children Act, 1926, and the Guardianship of Infants Act, 1925, which allow the magistrates in the summary courts to exercise a jurisdiction concurrent with the High Court and the County Courts. In the coming years it is certain that these powers will be increased rather than diminished. A working knowledge of the practice and procedure of the summary courts should therefore be of the greatest value to every solicitor's clerk even though for the moment he may be in an office where police court work is "not done," either because his employers specialise in other branches of the profession or because the old-fashioned Victorian belief that police court work is "not respectable" still lingers.

For the young solicitor who contemplates launching out on his own account, the police court is a most promising field. Many a flourishing business has begun with a modest office near a local court and there is no reason why the beginner to-day should not build up a good practice in the same way.

The common reproach against police court work is that "there is no money in it." Certainly the remuneration can never be as lucrative as in other branches of the profession. To the beginner, however, who without money or influence cannot obtain a position with an already established firm, these better paid activities are not usually open, whilst the more humble work of the police court is, and may prove to be the stepping-stone to higher things later.

Success in advocacy depends very much on the character and personality of the advocate. This is no less true of the police court than of more exalted tribunals. A good store of legal lore should be a great advantage, but is not always so, for it sometimes makes its possessor a wearisome pedant. Industry is another attribute, but the great advocate like the great poet is born, not made. He has an indescribable flair, a magic touch, winning where others would certainly fail and even when losing beating a masterly retreat, and so saving his client from the worst that might befall him.

The temptation into which the inexperienced advocate is most likely to fall is to regard his cases as of far greater consequence than everyone else's. They are all *causes célèbres* and he would like the court to go into them at great

length. Some cases are so important that they cannot be investigated too carefully. But not all; and the youthful advocate should endeavour to discriminate between cases which are important and those which are trivial. He has his duty to his client, but he must not overlook the difficulties of the court and remember that his cases are not the only ones in the list. Most courts to-day have more work than they can comfortably manage and they have a right to expect solicitors to co-operate with them in keeping cases as short as possible. They will not be pleased with a solicitor who is for ever trying to persuade them that his little fishes are enormous whales. This displeasure is often passed on consciously or unconsciously to the client in the shape of a longer sentence or a heavier fine; and a series of long sentences and heavy fines do not help to build up a local reputation, which is the beginner's first object.

The position of the solicitor admittedly is often a difficult one. His client may be spoiling for a fight, though he realises before a word of evidence has been given that his chances of success are negligible. In such cases he can only point out to his client what slender hopes he has of winning and recommend him to placate the court by frankly admitting his wrong and relying on an appeal in mitigation for lenient treatment. If the client refuses to take this course, he will have only himself to thank if he is dealt with harshly should he eventually fail.

Equally often, however, the solicitor and not the client is to blame—especially the young solicitor full of vim and ardour. He advises a fight when

he should advise surrender. He pictures himself as the hero of a forlorn hope, snatching victory in the teeth of overwhelming odds. Sometimes he does succeed. More often he does not. His client pays for what is little better than an ill-advised gamble and next time tries another man. The court remains and mentally notes that Mr. New-comer is an incorrigible wrangler, and cannot be trusted not to waste time.

Some advocates appear to model themselves upon famous counsel and amaze the courts with a string of subtle, technical points, fierce cross-examinations and heated arguments with their opponents. Such flashy performances are never so impressive as their perpetrators appear to imagine, especially if the magistrates all the time have their minds on cases that are being held up by them. A most common fault is to indulge in too lengthy cross-examination. The value of cross-examination is greatly over estimated. Young advocates read of the feats of well-known barristers as recorded in their biographies in this dangerous art and long to emulate them. They forget that their biographers only record their successes as the sun dial only tells the sunny hours. They draw a veil over the dreary wastes when question after question did nothing more than emphasise the case for the other side, bringing out details which had not yet been disclosed, and repeating others which had hitherto been but vaguely apprehended. How many times these "famous cross-examiners" must have sat down after a prolonged bout with a witness wishing that they had never asked a single question.

Not to cross-examine at all requires courage.

The client cannot appreciate the niceties of the game and expects a show for his money. He is apt to think that his advocate is not doing much for his fee if he keeps silent, though in doing so he may be serving his client's best interests. Generally, however, the client is satisfied if his case is put to the witnesses and their evidence firmly tested with a few challenging questions. The great temptation is to go too far. One famous advocate used to say that he never asked a question unless he knew the answer. Many cross-examinations can be summed up in the words "Far—farther—too far." Notice what so often happens when an advocate questions a police officer about his client's character—

"He's never been convicted, officer?"

"No, Sir."

"Never been charged before?"

"No, Sir."

Here the advocate should rest content. So often he does not but proceeds—disastrously—

"He's a perfectly good character, hasn't he?"

"I can't go so far as that, Sir."

It was very wisely said recently that "you cannot score and win." This is very true of the police court. Fight every case, attack the witnesses, show up the limitations of opposing advocates and you will eventually make yourself so unpopular that every man's hand will be against you. A friendly attitude will always reap its reward. The other side will be ready to oblige you. The magistrates will hesitate to deal as sternly as they were at first inclined with a client who has chosen so amiable a solicitor. The client goes away satisfied that he has been well advised and

his case competently handled. One satisfied client will bring others.

Except for patent irregularities it is best not to raise points of law, especially points of law upon procedure. The clerk's view of the law generally prevails in these matters and an advocate is not likely to win the bench to his side after the clerk has ruled against him. The law of evidence and procedure, indeed, is often very much what each individual court decides it to be. It varies as the law of equity used to vary with the length of the Lord Chancellor's foot. It may not be the law of England, but it is the effective law of that particular court, and that is the important thing for the immediate purpose.

No study is so likely to repay the budding practitioner so well as the careful observation of the personnel of the courts in which he appears. A barrister with a considerable practice once said, "I don't bother about the law but I know the judges better than they know themselves." He went on to say that for years he had made notes of the peculiarities of each judge before whom he had to appear, observing that one wanted the procedure to be in a certain way, a second in another; that one was more impressed by this argument, another by some other; or that one could be influenced most in pleading for mitigation if the appeal was based on grounds which would leave another cold, but who, in turn, could be much moved if he were told of something else. This was "practising at the bar" indeed. It is a method that the police court advocate will find worth a trial in his police courts.



## CHAPTER II

### SUMMARY PROCEDURE

#### (1) APPLYING FOR PROCESS

THE leading features of summary procedure can be set out briefly though, of course, there are many hundreds of cases upon points of detail which may have to be consulted in particular cases. If, however, the rules set out below are grasped and carefully followed, the novitiate will not go far wrong.

#### CRIMINAL OR CIVIL?

Magistrates try both criminal and civil cases summarily. Criminal cases are commenced by an *information laid* by a *prosecutor*. Civil cases are commenced by a *complaint made* by a *complainant*. Criminal cases are punishable in practically all instances by a fine and sometimes by imprisonment. In civil cases an order may be made in favour of the complainant which the defendant must obey. He is not punished as a criminal offender is. He is ordered by the court to do what other citizens regard as their duty and do not require court proceedings to compel them to do it—as for example, the duty of a husband to maintain his wife. If he fails to do this, the wife may ask the court for an order to compel him to support her. If, however, the woman has to be supported by the ratepayers, the husband then becomes criminally liable and may be sent straight off to prison.

## CRIMINAL CHARGES—INDICTABLE OR SUMMARILY

If there is any doubt whether an offence is a summary offence or an indictable offence, the question can be answered by looking at the Act under which proceedings are taken. Magistrates are creatures of statute—that is, the authority for all they do is based on Acts of Parliament, and if nothing can be found in the statutes to authorise the magistrates to try a particular offence, then it must be indictable—for it cannot be a summary offence.

If Parliament intended the magistrates to deal with the offence, we shall find in the Act, a word or phrase or section which says so. Often the section which creates an offence ends by stating that anyone who commits it, shall be liable “on summary conviction” to a penalty. The words “On summary conviction” mean that the offence is a summary one to be tried before the magistrates. Sometimes the single word “summarily” is used. In recent Acts, a section is often found, usually at the end, making all offences created by them triable summarily, as, for example, s. 113 (1) of the Road Traffic Act, 1930.

## TO WHAT COURT SHOULD A CASE GO?

Our first consideration when we have a summary case to deal with should be the question of jurisdiction. If we are prosecuting to what court should we apply? If we are defending has the court to which our client has been summoned the right to

try the offence? The rule of jurisdiction for summary criminal offences and civil complaints is simple. The first are triable in the jurisdiction where they were committed; the second in the jurisdiction where the cause of complaint arises.

Cases occurring within 500 yards of the boundary of a jurisdiction may be dealt with as though they occurred within it. Those occurring on a journey may be dealt with in any jurisdiction through which the journey was made. Further provisions as to jurisdiction in unusual cases will be found in s. 46 of the Summary Jurisdiction Act, 1879.

A thorough knowledge of the boundaries of the various jurisdictions in the locality in which an office is situated will prove to be of the greatest value. In any case of doubt, the police who execute the process of the court will readily give their advice. An application to the wrong court almost always means a second application to the right one at great expense of time and temper.

## THE APPLICATION

The application for a summons is made by the prosecutor or complainant personally or by his solicitor. In busy areas where the court sits several days a week, applications are usually made before the magistrates begin the cases they have to hear. In areas where the court sits less frequently, they are often made at the office of the magistrates' clerk or at a magistrate's private house. There is no need for it to be made publicly in open court.

Here again the practice of each court should if possible be discovered beforehand so that no time is lost in fruitless calls.

## THE INFORMATION

Unless expressly required by statute the information need not be in writing or sworn on oath where the informant is asking only for a summons. If, however, he wants a warrant the information must be in writing and must be sworn before the magistrate who is asked to issue it.

In practice the information for a summons is often put on the summons form itself; that is to say, the summons form contains all that is needed for the information—the name of the prosecutor, a statement of the offence with which the accused is charged, and the date when it was alleged to have been committed. Then follows notice of the time and place of hearing, which is really the “summons” part of the document.

The information for a warrant should contain a statement by one or more witnesses in the case. For instance, if the warrant is against a husband for running away and leaving his wife chargeable to the County Council, the information might be drawn as follows—

JOHN BAILEY, Council Offices, B——.

I am investigating officer of the Loamshire County Council. Mrs. Smith has informed me that her husband left her on 2nd April, 1935, saying that he was going to work. Since then she has neither seen nor heard of him. On 3rd May she and her two children became chargeable and have received 12s. per week out-relief since. At present Smith's whereabouts are unknown. I have ascertained that he has not been seen at his place of employment since 1st April.

(Signed) JOHN BAILEY.

Taken and sworn before me this  
8th day of June, 1935.

WILLIAM RIGHT, J.P.

It will be noticed that an information may contain hearsay statements which would not be allowed in evidence during the hearing in court. The informant may also include what he has found out by enquiries which would have to be proved by other witnesses. All documents referred to in the information should be produced with it.

For an order, a complaint takes the place of an information. This also need not be in writing or on oath except in the very rare instances when a warrant is asked for.

Both informations and complaints must be for one matter only; and only one offence or complaint must appear in the summons or warrant. A summons alleging an assault and wilful damage would be bad because a separate summons should be issued for each offence. If the magistrates convicted on such a summons the conviction might later be quashed on appeal.

A magistrate is not bound to issue a summons even if he is satisfied that an offence has been committed. He may refuse it if he thinks the prosecution vexatious or against public policy (*R. v. Bros* (1901), 18 T.L.R. 39).

### TIME LIMIT

With few exceptions applications for process in all summary cases must be made within six months of the date on which the alleged offence was committed, or when the cause of complaint arose. This rule is strictly observed by the courts. Some Acts—for example National Health and Unemployment Insurance Acts—allow a longer limit. Some offences have been held to be continuing

offences so that the limit begins to run from the last day up to which the offence continued. In the same way there are continuing complaints, as for example the desertion of a woman by her husband.

### SERVICE OF SUMMONS

A summons cannot be heard by a court unless it has been properly served. This is usually done by the local police. The summons must be served personally or must be left at the defendant's last or most usual place of abode. In a few cases a summons left at a defendant's place of business is good service. By the Service of Process (Justices) Act, 1933, summonses may be sent by post.

### WARRANT

Upon any criminal information, a magistrate may instead of issuing a summons in first instance grant a warrant of arrest to bring the alleged offender before a court forthwith. A warrant is usually issued instead of a summons where the defendant has disappeared; for example, in charges against a husband for running away and leaving his wife and family chargeable to the County Council. Sometimes a warrant is issued at once if there are grounds for fearing that the defendant may repeat the offence if allowed to remain at large; for example, a violent man may commit another assault when he discovers that proceedings have been taken at court against him.

Generally, however, where the defendant's name and address are known, a summons is issued first. If he then fails to appear, a warrant may be issued.

A warrant can also be issued upon a complaint for an order but not in first instance. In this case, before a warrant can be issued, the magistrate must be satisfied that a summons has been served and disobeyed. As, however, the court may proceed to make an order in the absence of the defendant after proper service of a summons, a warrant is rarely issued.

A warrant cannot be issued against any person who fails to appear upon complaint for the recovery of a "civil debt."

### WITNESSES—OBTAINING ATTENDANCE

By s. 7 of the Summary Jurisdiction Act, 1848, if a witness refuses to attend court he may be compelled to do so by witness summons. Sworn application must be made for this by "any credible person"—usually the prosecutor or complainant—that the person whose attendance is required is "likely to give material evidence and will not voluntarily appear." In other words, before the application is made, the witness must have been asked to attend and must have refused to do so. A reasonable sum must be tendered to the witness for his costs and expenses.

If the witness disobeys the summons, a witness warrant may be issued on proof of service of the summons. A warrant may also be issued in first instance.

If when he reaches court, a witness so summoned or brought by warrant refuses to take the oath or affirm or refuses to answer when questioned, he may be committed to prison for seven days.

By s. 29 of the Criminal Justice Act, 1914, the

power to summon a witness includes the power to require the witness to produce "books, plans, papers, documents, articles, goods and things likely to be material evidence." This very useful power obviates the necessity of obtaining a *subpoena duces tecum* from the Crown Office.

## (2) COURT PROCEEDINGS

### THE COURT

Most summary cases must be heard by two or more justices acting together. A magistrate acting alone cannot impose a fine of more than twenty shillings or inflict more than fourteen days' imprisonment. Stipendiary magistrates can do alone any act which two or more justices may do together. Stipendiaries are barristers of at least seven years practice at the Bar and are appointed by the King on the advice of the Home Secretary.

Two justices are necessary only for the determination of summary informations and complaints—that is for the actual trial of defendants. Summonses and warrants can be granted by one magistrate acting alone and he need not be one of the magistrates who later try the case. Similarly, after the trial, only one magistrate need sign a commitment or distress warrant issued in pursuance of a summary trial and he need not be one of the magistrates who actually tried the case (Summary Jurisdiction Act, 1848, s. 29).

During the hearing of the case, however, two magistrates must be present throughout. If, for example, one of two who heard part of the evidence on one day is unable to attend when the rest of the



evidence is given on a later date another justice must be obtained and the hearing must be commenced afresh; the witnesses who have given evidence must be recalled and resworn and their evidence repeated in the presence of the new justice.

The chairman of the bench has no casting vote and if the votes are equal, the court may adjourn and the case be heard again before a reconstituted bench (*Bagg v. Colquhoun*, [1904] 1 K.B. 554). If the court refuses to do this, the case should be dismissed (*R. v. Ashplant* (1888), 52 J.P. 474).

### DOUBTS AS TO POWERS

If magistrates are in doubt as to whether they have the power to do any act which they are asked to do, they should compel the person who wants the act done to show them on what authority he asks them to do it—as, for example, an Act of Parliament, a byelaw or a reported case. If no authority can be produced, they should refuse to act, leaving the appellant to apply to the High Court to show cause why the magistrates should not do what is asked of them.

### OPEN COURT

With few exceptions (see, for example, Guardianship of Infants Act, 1925, s. 9 (4) ), all summary cases both civil and criminal must be tried and determined in open court. The court must be held at the “Petty sessional court house” where magistrates usually sit to deal with their cases. In exceptional circumstances, the court may be held in an “Occasional court house.” The place,

however, must have been previously appointed and public notice given that it would be so used. An occasional court cannot impose more than fourteen days imprisonment or a fine of exceeding twenty shillings.

## APPEARANCE OF PARTIES

If on the day of hearing the informant or complainant fails to appear, the defence can ask for the case to be dismissed. This is usually done unless it is a serious one or the court thinks the informant is absent by mistake. It may then adjourn the hearing and in criminal cases may communicate with the Director of Public Prosecutions for him to consider whether the offence is sufficiently serious for him to continue the prosecution.

If the prosecutor or complainant appears but not the defendant, the court may proceed in his absence or adjourn the case giving notice to the defendant of the adjournment.

A complaint may be dealt with in the absence of the defendant and in practice many are so dealt with. Many small criminal informations are also dealt with in the absence of the defendant. It is the general practice of the courts to-day to deal with these less serious cases upon receipt of a letter from the defendant asking to be excused from attending. In more serious cases where a heavy fine may be imposed or a term of imprisonment is a possibility, the courts generally insist upon personal appearance and may sometimes go so far as to issue a warrant if the defendant ignores a summons.

## TRIAL BY JURY FOR SUMMARY OFFENCES

For a number of summary offences the defendant is liable on conviction to more than three months imprisonment without the option of a fine. In these cases, the courts invariably insist upon the personal appearance of the defendant for he has the right to claim to be tried by a jury. At the commencement of the hearing before any evidence is heard the defendant must be told by the magistrates that he has this right and if he decides to exercise it the magistrates must then treat the case as though it were an indictable offence of which they were conducting the preliminary examination. The procedure to be followed is fully set out in s. 17 of the Summary Jurisdiction Act, 1879. The number of offences to which it applies is increasing with recent legislation. For instance, the Road Traffic Act, 1930, added to this class the offences of being under the influence of drink whilst in charge of a car on a public road, driving in a manner dangerous to the public and several others.

When we are called upon to defend these more serious cases, it is most important to discover whether the defendant has the right to be tried by a jury or not, because in some districts it is notorious that he may have a better chance of acquittal or of a lenient sentence at Quarter Sessions than with the justices. In other districts the converse is the case.

The privilege cannot be claimed in cases of assault nor in charges under the Vagrancy Act,

1898, made against male persons knowingly living on the earnings of prostitution or importuning for immoral purposes.

## RIGHTS OF PARTIES TO ADVOCATES

Full rights are granted to parties to have their cases conducted by counsel or attorney. By s. 13 of the Summary Jurisdiction Act, 1848, the complainant or informant may appear by advocate but it does not expressly give the same privilege to the defendant. It is, however, the well-established practice in the summary courts to deal with a case upon the appearance of an advocate in the absence of the client except in the more serious offences mentioned above and in cases where the defendant has been bound over on a recognizance at the police station to appear later at court. Many "drunks" would be only too glad to escape the disgrace of a public appearance in court if they could send an advocate instead. Here again a knowledge of the practice of each court is invaluable. At some if a defendant fails to appear when bound over at the station, a warrant is issued forthwith; but the less drastic practice is becoming common of issuing instead two summonses—one for the actual offence and one for breach of recognizance. To answer these the vicarious services of an advocate may be employed and in this way the defendant may escape a highly distasteful public appearance.

## THE DEFENDANT'S PLEA

A defendant may plead guilty or not guilty.

If he pleads guilty the court may hear the facts

narrated unsworn by the prosecutor or his advocate and proceed to pass sentence or make an order without hearing any witnesses. The court may accept the plea of an advocate even if the defendant is absent and deal with the case in the same way without formal proof of guilt. The plea of the advocate is binding on the defendant.

### CONTESTED CASES

The procedure where the defendant pleads not guilty will be found in s. 14 of the Summary Jurisdiction Act, 1848.

First the prosecutor is heard and his witnesses. The defendant has the right to cross-examine them. Then the defendant and his witnesses may give evidence.

Finally the prosecutor may give evidence and call witnesses "in reply" to any point raised by the defence which he could not reasonably have anticipated in advance.

Only one speech each should be allowed—the prosecutor at the opening of the case and the defendant before he and his witnesses give evidence. The defendant is not bound to give evidence. He can content himself with arguing that the prosecution have not made out their case or putting his case unsworn in the form of a statement.

The court itself may ask any relevant question of a witness and may call a witness although he may not have been tendered by the parties.

Upon a point of law arising both parties may make their submissions.

After this the court makes its decision.

## ADJOURNMENTS

Magistrates have full power to adjourn summary cases (Summary Jurisdiction Act, 1848, s. 16). In the meantime they may “suffer the defendant to go at large” or may require him to find sureties or may commit him to prison. No limit of time is fixed for such committal but in practice the remand rarely exceeds eight clear days if the defendant is kept in custody.

## EVIDENCE AND CRIMINAL LAW

A number of points arising under these heads are dealt with at page 66.

### (3) THE VERDICT AND SUBSEQUENT PROCEEDINGS

#### NOT GUILTY

If the court finds the defendant not guilty he is at once discharged. He cannot again be charged with the same offence.

#### GUILTY—PUNISHMENT IN CRIMINAL CASES

If the defendant is found guilty of a criminal offence, there are a number of ways of dealing with him which the court may choose—by a fine, imprisonment, probation and so on.

#### TAKING OTHER OFFENCES INTO ACCOUNT

There is now a fairly established practice for the courts upon finding a prisoner guilty of one offence

to take others into account when assessing the punishment although no charges have been formally made in respect of them. This can only be done if the prisoner agrees and admits the new charges. He often does this so that he can start on release with a clean slate. Mr. Justice Swift, however, recently laid down that only similar offences to that with which the prisoner is actually convicted should be taken into account in this way.

### FINES

Justices for almost all criminal offences have power to impose a fine. The maximum is in most cases limited by the statute which creates the offence.

A number of Acts of Parliament have mitigated the severity of earlier Acts and it may be useful in defending a client to bear these in mind.

Where, for instance, an Act gave justices power to impose imprisonment but no authority to impose a fine, s. 4 of the Summary Jurisdiction Act, 1879, now allows them to impose a fine not exceeding £25. S. 5 limits the alternative imprisonment which may be awarded for non-payment of a fine.

A useful service may often be done for a client by appealing to a court to allow the defendant to pay his fine in instalments by virtue of s. 7.

S. 1 of the Criminal Justice Administration Act, 1914, makes the allowance of time to pay a fine obligatory unless

- (1) the defendant has sufficient money with him to pay the fine at once;
- (2) he does not want time to pay;

(3) he has no fixed abode;

(4) there is some special reason for refusing time to pay (as for example, that the defendant did not pay an earlier fine; or if allowed time, will earn the money by committing another offence).

S. 5 of the same Act sets up the principle that "in fixing the amount of any fine a court shall take into consideration amongst other things the means of the offender." If the court decides to convict, the defendant's solicitor should not only press for a fine rather than imprisonment but also for a fine sufficiently moderate for his client to be able to pay it. He should be able to give the court full particulars of his client's means and family obligations.

If the fine is not paid justices may distrain upon the property of the defendant or may commit him to prison for a term in proportion to the fine as laid down by s. 5 of the Summary Jurisdiction Act, 1879.

Since the enactment of s. 25 of the Criminal Justice Administration Act, 1914, distress warrants have somewhat fallen out of use. If a defendant is granted time to pay the magistrates may issue a commitment at once and as this is an easier way of enforcing payment it is usually employed.

## IMPRISONMENT

For many summary offences justices are empowered to impose imprisonment without the option of a fine—for all offences under the Vagrancy Acts, for assaults, for offences against the



Gaming and Betting laws, for the more serious motoring offences and a number of others.

Sentences of imprisonment may run concurrently or consecutively subject to limitations imposed by s. 18 of the Criminal Justice Administration Act, 1914. In most cases, consecutive terms for summary offences must not exceed six months and for indictable offences dealt with summarily they must not exceed twelve months.

### COSTS

S. 18 of the Summary Jurisdiction Act, 1848, gives justices full discretion to award costs against the defendant if he is convicted and against the prosecutor if he loses his case. It is not often, however, that costs are awarded against the prosecutor unless the court feels that he ought not to have made the charge.

Where costs are awarded against the defendant and a fine is also imposed, the costs may be included in any warrant issued for non-payment of the fine. If no fine is imposed, the defendant may be imprisoned for a period not exceeding one month, the maximum time again being subject to the limitations of s. 5 of the Summary Jurisdiction Act, 1879.

Where the defendant is sentenced to a term of imprisonment and fails to pay the costs, the court may order the term in default to commence at the expiration of the other term of imprisonment (Summary Jurisdiction Act, 1848, s. 24).

### COSTS AGAINST PROSECUTOR

Costs against the prosecutor are enforceable as a civil debt. (See page 29.)

## ONE DAY'S DETENTION

Power to make an order of one day's detention instead of imposing a fine or imprisonment is granted by s. 12 of the Criminal Justice Administration Act, 1914. Many courts use this power for dealing with a poor defendant instead of imposing a fine. By remaining in the custody of the court until it rises or at a police station until evening, he wipes out his score on the same day. This power has been extended by s. 4 of the Money Payments (Justices Procedure) Act, 1935.

Sometimes the magistrates use this power to register a conviction, for the purpose of a committal to Borstal or for proceedings under the Vagrancy Acts.

## BORSTAL

Defendants are not sent to Borstal Institutions direct from the summary courts. The procedure is laid down by the Criminal Justice Act, 1914, s. 10. Such defendants must be charged with an offence for which at least one month's imprisonment without the option of a fine can be imposed. They must be not less than sixteen or more than twenty-one; they must have been previously convicted, or have failed to observe the conditions of a probation recognizance; and there must be some evidence that the defendant has been associating with persons of bad character or has criminal habits and tendencies. When the magistrates are satisfied on all these points they may commit the defendant to Assizes or Quarter Sessions for that

court to consider whether he should be sent to one of these institutions.

Defendants may of course be committed in this way after being summarily convicted of an indictable offence.

## PROBATION OF OFFENDERS ACTS

A very popular method of dealing with defendants found guilty of criminal charges is that of placing them on probation. In the same way as in the old days the courts of equity could temper the severity and rigidity of the common law, so may probation be said to soften the harshness of our criminal laws. By means of it judges and magistrates deal leniently with hard cases so that now there is no longer any need to strain the law to deal with them humanely and mercifully.

The summary courts are authorised to deal with offenders in this way by s. 1 (1) of the Probation of Offenders Act, 1907. The following sub-section applies to convictions on indictment. A curious difference is noticeable between the two sub-sections. By the first, where the court "thinks that the charge is proved," it may "without proceeding to conviction" make an order in pursuance of the Act. By the second, for indictable charges, the order is made *upon conviction*. So that a charge dealt with under the Probation Acts in the summary courts is not a conviction whilst one that is dealt with in the same way at Assizes or Quarter Sessions is a conviction.

The Act in s. 1 sets out at some length in what circumstances courts would be justified in making a probation order—they should consider "the

character, antecedents, age, health or mental condition of the person charged, or the trivial nature of the offence, or the extenuating circumstances under which the offence was committed.”

At some courts the belief exists that only first offenders can be placed on probation. This of course is not so. Defendants with long records have often been dealt with in this way at Assizes by the judges. The probable origin of this erroneous belief is to be found in the Probation of First Offenders Act, 1887, which was the forerunner of the Probation Acts and which as its name implies was only applicable to defendants with no previous convictions.

### DISMISSAL UNDER THE PROBATION ACTS

Justices may deal with defendants under the Probation Acts in two ways. Firstly, they may simply dismiss the information or charge. This is usually employed in very trivial cases where the magistrates think that technically the law has been broken but in the circumstances there is no need to inflict a penalty.

### DISCHARGE ON RECOGNIZANCE

In more serious cases, the second method is usually employed. The defendant is discharged “conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and appear for conviction and sentence when called on at any time during such period not exceeding three years.”

This means of course that the defendant is

allowed to go free on his entering into the recognizance, which is a sort of contract with the Crown to keep straight during the period fixed. This is usually twelve months. A defendant cannot be compelled to enter into a probation recognizance. As it is always to his advantage to do so, he rarely refuses but if he does, the court must give up its intention to make a probation order and deal with him in other ways.

### CONDITIONS OF RECOGNIZANCE

The court in its discretion may add conditions to the recognizance—one being that during the period specified the defendant is to be under the supervision of a probation officer; by s. 8 of the Criminal Justice Administration Act, 1914, other conditions may be “in respect to residence, abstention from intoxicating liquor, and any other matters as the court may consider necessary for preventing a repetition of the same offence or the commission of other offences.”

During the currency of the Probation Order the defendant may be summoned to court at the request of the Probation officer to have the terms of the order varied or discharged (Probation of Offenders Act, 1907, s. 5).

### BREACH OF CONDITIONS

If the defendant gets through the period fixed for the recognizance satisfactorily no further action can be taken against him for the offence for which he was placed on probation. If, however, he breaks his recognizance he can be brought back to the court by summons or warrant, and if the court

holds that he has broken the recognizance he may be dealt with in the following ways—

(1) He may be convicted and sentenced for the original offence.

(2) His recognizance may be forfeited.

(3) He may be fined not exceeding £10.

In actual practice these methods are rarely employed to bring a wayward probationer to heel. Recognizances are most commonly broken by the probationer committing another offence. This is taken into account by the court when assessing the penalty for the new offence and no separate proceedings are taken. Where the probation order was made by another court, the second court should ascertain from the first whether it wishes the breach to be dealt with in this way or would prefer to proceed with the matter itself.

## COMPENSATION AND COSTS

A further order may be made against a defendant placed on probation that he may pay compensation and costs to the prosecutor to an amount not exceeding £25 (Criminal Justice Act, 1925, s. 7 (2) ). These are recoverable by distress and imprisonment (Summary Jurisdiction Act, 1848, ss. 18, 19).

## CIVIL ORDERS—HOW ENFORCED

If an order is disobeyed it can be enforced as directed by the Act under which proceedings are brought. If no directions are given, the order is enforceable as directed in s. 34 of the Summary Jurisdiction Act, 1879, by which the defendant may be ordered to pay £1 for every day during which he has failed to comply with it or to be imprisoned

until he has remedied his default. This sum, recoverable as a civil debt, must not exceed £20, and the period or periods of imprisonment must not amount to more than two months.

Costs may be awarded to a complainant or defendant in proceedings for a summary order. In both cases they are recoverable as a civil debt except where costs are given against a defendant when no order is made for him to pay a sum of money to the complainant. In this case they are recoverable by distress and imprisonment (Summary Jurisdiction Act, 1848, ss. 18 and 24).

### CIVIL DEBTS—ENFORCEMENT

Civil debts are sums of money due from one person to another which may be recovered in the courts. Generally creditors seeking to compel payment of these sums have to take proceedings in the High Court or County Courts but Acts of Parliament allow a number of specially favoured creditors to recover their dues quickly and cheaply in the summary courts. First among them is the Income Tax Collector who is allowed to recover arrears of taxes up to £50. Similarly most gas, water and electrical undertakings are empowered by their private Acts to recover unpaid accounts summarily.

Procedure for the recovery of these sums is regulated by ss. 6 and 35 of the Summary Jurisdiction Act, 1879. The creditor makes a complaint on which the court issues a summons. If the defendant fails to appear a warrant cannot be issued to compel his attendance but upon proof that the summons has been properly served and

that the amount claimed is due the court may proceed to make an order that the debt be paid.

If the debt is not paid as ordered, the complainant may then take out a distress warrant; alternatively or if the distress warrant proves fruitless, he may ask for a judgment summons. This is a summons to the defendant to appear at court and show cause why he should not be imprisoned for failing to comply with the order. If the complainant can show that since the order was made, the defendant has had the means to pay the debt, the court may sentence him to a term of imprisonment not exceeding six weeks. The defendant himself can be called into the witness box to be questioned about his means.

A debtor cannot be imprisoned more than once for non-payment of a debt but the imprisonment is no bar to the issue of a distress warrant if later he has property on which distraint can be levied.

### SURETIES TO KEEP THE PEACE

Under their commission justices are empowered to bind over any person that comes before them whom they consider likely to cause a breach of the peace or to incite public disorder.

By this power, magistrates can bind over any person who is before them; for example, the defendant to a summons for assault, instead of imposing a fine or imprisonment. It is not uncommon for the court to bind over both parties to an assault case where the magistrates feel that both are quarrelsome people equally blameworthy and likely to disturb the peace again unless restrained by a recognizance.



In cases of threats proceedings may be taken under s. 25 of the Summary Jurisdiction Act, 1879. The complainant must satisfy the court not only that the defendant has threatened him but that he goes in real fear of violence.

If the defendant refuses to enter into a recognizance or having done so breaks it, he is liable to imprisonment up to six months.

## CHAPTER III

### INDICTABLE OFFENCES

#### DEFINITION

AN Indictable Offence is a crime for which the defendant must be indicted and tried before a jury. Without the authority of an Act of Parliament, it cannot be tried in the summary courts but must be committed for trial at Assizes or Quarter Sessions.

Most Acts of Parliament—modern statutes invariably—state clearly whether offences created by them are to be tried summarily or on indictment. If an offence is intended to be dealt with on indictment, we shall find some words or phrases which clearly indicate this intention as for example—“the defendant shall be liable upon conviction on indictment.” If the offence is to be tried summarily, we shall find words or phrases which in a similar way make this intention clear. S. 164 (1) of the Bankruptcy Act, 1914, contains examples of these phrases both for indictable offences and for summary offences. In this case, an offence may be dealt with either summarily or on indictment.

Some Acts do not specify which procedure is to be followed. Offences under them must therefore be assumed to be indictable. Some offences cannot be found in an Act of Parliament at all. They depend upon case law. From the reports we find that such charges have been entertained by the

judges in the past and on the strength of these precedents will deal with similar cases in the future. For example, certain actions have been held to be a public mischief, others a public nuisance. No Act of Parliament prohibits them but on the authority of the case law, criminal proceedings can be taken on indictment. They cannot be dealt with summarily.

### (1) INDICTABLE OFFENCES TRIABLE SUMMARILY

Many indictable offences, however, go no further than the summary courts. The reason for this will be found in s. 24, Criminal Justice Act, 1925, which allows justices to try certain indictable offences if the defendant is willing to give up his right to be tried by a jury. Before doing so the magistrates should hear what the prosecution think about having the charge dealt with summarily, and should take into consideration "the character and antecedents of the accused, the nature of the offence" and whether other circumstances increase or diminish the seriousness of the charge.

When the Director of Public Prosecutions is prosecuting, the court is not allowed to deal with a charge unless he consents. A similar veto is given to Public Bodies when prosecuting and to the prosecutor in a case affecting the property or affairs of the King.

When the magistrates decide that the charge is one that they can properly try, the defendant is asked "Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?" If the defendant consents the case proceeds

in exactly the same way as a summary offence. The defendant on conviction may be fined £100 or imprisoned for six months or both these penalties may be imposed at once.

Indictable Offences which can be dealt with in this way are set out in the Second Schedule to the Criminal Justice Act, 1925. They include most charges of stealing (but not horse stealing or any of the aggravated forms of larceny such as robbery or house breaking), false pretences, embezzlement, falsification of accounts, attempted suicide, indecent assault on a child or young person under 16, some forgery charges and a number of others.

Any charge of aiding and abetting these offences is also triable summarily and so are attempts to commit them. A charge of inciting another person to commit any of these offences or any summary offence may also be dealt with under this Act.

## **(2) PRELIMINARY EXAMINATION OF INDICTABLE OFFENCES**

The procedure magistrates should follow in dealing with indictable offences before committal is laid down by the Indictable Offences Act, 1848.

## **PRELIMINARY EXAMINATION NOT A TRIAL**

There is a very great difference between the magistrate's task when he is hearing an indictable case which he is going to commit for trial and when hearing all other cases. When the magistrate hears the evidence in a case which he intends to commit the defendant is not on trial at all though it looks

very much as though he is. The magistrate is simply hearing what evidence the prosecution can bring against the defendant to see if it is sufficient to put him on his trial by judge and jury at Assizes or Quarter Sessions. The proceedings are called not a trial but a preliminary examination, and as it is not a trial the proceedings before the magistrate are not necessarily final. After hearing all the evidence for the prosecution he may say "I don't think this is sufficient," and he then *discharges* the prisoner. But he does not *acquit* him. Consequently if the police can discover further evidence against him later they can re-charge him and the magistrates then reconsider in the light of the new evidence whether there is now sufficient evidence on which to commit him.

If, however, the defendant is committed and is acquitted by the jury the position is very different. He then has been tried—he has been placed in peril, as the legal phrase has it—and once he has been acquitted by a jury he cannot be recharged whatever additional evidence comes to light. There is a celebrated case where a butcher was charged with murder. He was acquitted by the jury and a week later he was going round openly boasting that he had in fact committed the murder of which he had been accused. But he could not be charged again as he had been acquitted after a trial and that acquittal was final. If he had been discharged by the magistrates he could have been recharged. His own statements could have been given in evidence against him and would have ensured his conviction.

Although the hearing before the magistrates is only in the nature of a preliminary investigation and is not final it would be a great mistake to think it is not important. Once a defendant is discharged by the magistrates the prosecution very rarely recharges him; and the dismissal must save a client a good deal of anxiety and expense whilst awaiting the Assizes or Sessions.

## JURISDICTION

Magistrates can deal not only with indictable offences which have been committed in their jurisdiction but also with persons who have committed an offence outside it but who happen to be arrested within it. As a general rule, however, indictable offences like summary offences are dealt with in the jurisdiction in which they were committed. This is usually much the more convenient course because in most cases the witnesses reside in the area where the offence was committed and the local police have already begun investigations.

Where a defendant has committed a series of indictable offences in a number of different jurisdictions, he may be charged with all the offences in any one jurisdiction in which he has committed an offence; for instance proceedings may be taken against a burglar for offences in a number of towns in any one of which he has committed a burglary (Criminal Justice Act, 1925, s. 11 (2)).

Two defendants can be dealt with jointly for one offence though one committed his share in another jurisdiction. (Criminal Justice Act, 1925, s. 31 (1)). If, for instance, one man steals something in London and another receives it in

Leeds, both can be charged either in London or Leeds.

Sometimes a crime is committed near the boundary of a jurisdiction and it is doubtful whether it was just inside or just out. By the Criminal Law Act, 1826, the jurisdiction of any court extends 500 yards beyond its boundary. This latitude will meet any cases of doubt. By the same Act, where an offence begins in one jurisdiction and ends in another, it can be dealt with in either. For instance, a man might be wounded in one jurisdiction and he might die of his wounds in another. His assailant could be charged in either. The same Act provides that where an offence takes place on a journey, proceedings may be taken in any jurisdiction through which the journey was made.

### GRANT OF SUMMONS OR WARRANT

Many defendants charged with indictable offences are arrested by the police without warrants or summons. Applications for process for felonies are rare. Occasionally a warrant is applied for where the defendant has left the neighbourhood in which the offence was committed. Sometimes a warrant is granted to a private prosecutor where the police have refused to act.

As in summary charges, the magistrates may issue a summons for an indictable offence; or they may issue a warrant upon sworn written information (see page 10).

A summons for an indictable offence may be served in the same way as a summons for a summary offence.

## LIMITATION OF PROSECUTION

Unlike prosecutions for summary offences, there is no general limit of time within which prosecutions for indictable offences must be brought. Under a few statutes, however, there is a limit. Here are some of them.

Blasphemy Act, 1697: Four days.

Riot Act, 1714, s. 8: Twelve months.

Customs Consolidation Act, 1876, s. 257: Three years.

Criminal Law Amendment Act, 1885, s. 5: Nine months.

Merchandise Marks Act, 1887, s. 15: Three years after offence or one year after discovery.

Perjury Act, 1911, s. 3 (2): Eighteen months after marriage.

## WITNESSES—OBTAINING ATTENDANCE

Witnesses both for the prosecution and the defence may be compelled to attend to give evidence and produce documents as in summary cases (Indictable Offences Act, 1848, s. 16, and Criminal Justice Administration Act, 1914, s. 29). As in summary cases, if he refuses to attend or give evidence he may be imprisoned for seven days.

## (3) PROCEDURE IN COURT

### THE COURT

The preliminary examination of an indictable offence may be conducted by one justice. He need not sit in open court and the time and place of hearing need not be made public. This is because



as we have already seen the preliminary examination is only an investigation and not a trial. In practice, however, magistrates rarely deal with indictable offences alone and they usually hear them in the same court house where the summary cases are heard. This is obviously a sensible practice because as we have seen many indictable offences are eventually dealt with summarily and the moment the defendant consents to being tried in the lower court, the rules for summary trials apply—that is, there must be two or more justices and the hearing must be in public in the usual court house.

It is worth while bearing in mind, however, that the preliminary examination need not be heard in public. It sometimes happens that there are very good reasons for asking the court to suppress the name and address of a witness. If the magistrates are reminded that the press and public have no claim of right to the information they usually accede to the request.

### DEFENDANT MUST BE PRESENT

During the hearing of summary offences the defendant need not be present but an indictable offence cannot be proceeded with unless the defendant is personally before the court. The only exception is where the defendant is so disorderly that the witnesses cannot be heard. The case may then be continued in the defendant's absence.

Although the defendant himself must be present, he may be represented by counsel or solicitor. Similarly the prosecution may be conducted by an advocate but not by an informant for strictly

speaking he is not the prosecutor but the Crown. The private informer has therefore no *locus standi* in these examinations as he has in summary prosecutions. For this reason it is irregular for a police officer to conduct the prosecution of an indictable offence in a police court.

## THE DEPOSITIONS

The great feature of these preliminary examinations is the taking of the depositions. This is invariably done by the clerk on behalf of the magistrates. Each witness is sworn and the clerk writes down his evidence. The prisoner or his advocate is allowed to cross examine the witness when he has given his evidence-in-chief. His answers are added to the deposition; so too is anything elicited from the witness in re-examination. The deposition is then read aloud to the witness and when he is satisfied that his evidence has been correctly taken down, he must sign it.

## WITNESSES FOR THE DEFENCE

After the depositions of the witnesses for the prosecution have been taken, the magistrates must read and explain the charge to the defendant and then should add—"Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial."

Two courses are now open to the defendant. He can make a statement from the dock which will be written down by the clerk and read to him. If he wishes he can sign the statement. He or his

advocate can also submit that the evidence is insufficient to warrant a committal. Alternatively or in addition the defendant can then give evidence as a witness and can also call witnesses in his own behalf. This evidence is taken down in the form of depositions, which are read over and signed like those of the witnesses for the prosecution. If the case is committed these depositions go forward to the court of trial with the depositions of the prosecution. The procedure is fully set out in s. 12 of the Criminal Justice Act, 1925.

In defending a prisoner we must consider whether it will be best to bring forward his witnesses at the police court or to reserve them for the court of trial. Where a strong case can be made on his behalf, the sooner it is revealed the better. The judges in a number of cases have recommended that the case for the defence should be disclosed at the police court (*R. v. Winkworth* (1908), 1 Cr. App. R. 129). If it is held back until the trial, it is always open to the suspicion that it will not stand too close an investigation. Justices should do nothing to discourage but should encourage the defence to call their witnesses at the police court (*R. v. Nicholson* (1909), 73 J.P. 347).

### DEPOSITION OF SICK WITNESS

If a witness is too ill to travel to court, his deposition may be taken at his bedside. Special provision is made for the sick witness by s. 6 of the Criminal Law Amendment Act, 1867, but this is rarely used because his evidence can usually be taken in compliance with the Indictable Offences Act, 1848, if a charge has been made and the

defendant can be taken to the witness as well as the magistrate and clerk. As we have already said the preliminary examination need not be held in public or in the usual court house. Hence, if a witness is unable through illness to come to court, there is no reason why the court should not go to the witness. The magistrates attend with their clerk at the patient's bedside, the defendant is brought in and the deposition is taken in the ordinary way.

If at the trial the witness cannot attend (and also any witness who gave evidence at the preliminary examination in the ordinary way) his deposition may be read to the court of trial and accepted as evidence. Before this can be done, proof must be given that the witness since the deposition was taken has died or become insane or is too ill to travel; and that the deposition was correctly taken (Indictable Offences Act, 1848, s. 17, and Criminal Justice Act, 1925, s. 13 (3) ).

A similar provision in the case of children and young persons is s. 43 of the Children and Young Persons Act, 1933.

### DYING DECLARATION

The deposition of a sick or dead witness must not be confused with a dying declaration admitted as evidence in murder and manslaughter charges. (See page 71.)

### DISPENSING WITH WITNESSES

Where the defendant intends to plead guilty at the court to which he is committed, it will be to his advantage to say so at the police court. By

s. 13 of the Criminal Justice Act, 1925, where this course is being taken the witnesses need only be bound over to attend at the trial "conditionally" which means they will not have to attend unless later they get further notice. In this way the prosecution should be saved a good deal of expense and if it is pointed out to the judge that this course was adopted, it is likely to be rewarded with a smaller sentence.

### REMAND

The power to remand on a preliminary examination is given by s. 21 of the Indictable Offences Act, 1848, and s. 20 (2) of the Criminal Justice Administration Act, 1914. If the prisoner is not admitted to bail, he must not be remanded for more than "eight clear days" which means that he must appear in court again not later than the ninth day. If the defendant is on bail he may be remanded for any period with the consent of the prosecution.

### COSTS

Costs of indictable offences (including indictable offences dealt with summarily) are regulated by the Costs in Criminal Cases Act, 1908. Witnesses are paid out of the county fund at a fixed scale. Legal costs for the prosecution in proceedings before the magistrates are rarely asked for and rarely granted. Power to award them is given by s. 1 of the Act. Costs cannot be granted to the defendant on dismissal unless in the words of s. 6 (3) of the Act, "the examining justices are of opinion that the charge was not made in good faith."

## COPIES OF DEPOSITIONS

Copies of depositions are usually supplied by the clerk of the court to both the prosecution and the defence upon payment of the usual fees. Only the defendant, however, can claim them as of right and then only after he has been committed for trial (Indictable Offences Act, 1848, s. 27).

Whenever possible a complete copy of the depositions should be obtained. An exact knowledge of what they contain and also the precise words alleged to have been used in statements is often of the greatest value later at the trial.

How true this is a study of Marjoribanks' *Life of Marshall Hall* will reveal. Sir Edward studied the depositions until he found the weak points of the prosecution. Time after time he was able in this way to secure an acquittal at the trial for charges which upon the evidence as it appeared in the depositions looked like certain convictions.

### (4) COMMITTAL AND SUBSEQUENT PROCEEDINGS

#### COMMITTAL OR DISCHARGE

After all the depositions have been taken, the court must decide whether it thinks there is sufficient evidence to justify the committal of the defendant to trial. By s. 25 of the Indictable Offences Act, 1848, "if the justices shall be of opinion that the evidence is not sufficient . . . they shall forthwith order the accused to be discharged": but if they think "such evidence is sufficient" or "if the evidence raised a strong or

probable presumption of the guilt of the accused party" then they shall commit him for trial.

In making this decision the justices should take into consideration not only the evidence given by the witnesses for the prosecution but also any statement made by the prisoner and of any evidence he may give and of his witnesses. The question the court has to set itself when considering whether the defendant should be committed or not may be expressed as follows. "On this evidence is it reasonable to suppose that a jury might convict?" "Might twelve normal, reasonable men unanimously think the defendant guilty?"—not "Might twelve men be found who would convict?" The question for the jury is a particular one—"Did this defendant commit this offence?" The question for the justices is a general one, an approximation—"On this evidence, is the defendant likely to be found guilty by a jury?"

Round these questions many a keen battle has been fought. If as advocate for the defendant we can persuade the magistrates that conviction is unlikely, we shall have saved our client not only a good deal of anxiety and expense but have rendered his chances of again being accused of the offence very remote.

### BAIL ON COMMITTAL

When the justices commit a defendant, they must then decide whether whilst awaiting trial he shall be released on bail or shall be kept in prison. As the trial may not take place for some weeks this is a question of the greatest importance to the defendant. His advocate can do him a very great

service if he can persuade the bench to grant bail which is usually opposed by the prosecution.

The judges have on many occasions recommended the more free admission of committed defendants to bail. The timid attitude of many benches when the local police oppose the defendant's application is difficult to justify. In a circular issued by the Home Office in 1906, the Home Secretary urged justices to grant bail more freely, observing that "Where a person who is charged with a minor offence appears to have little or no means, and is not believed to belong to the criminal, vagrant or homeless classes, the justices should generally grant the accused his release pending trial, either on his own recognizances or on bail in such small amount as he may reasonably be expected to find. Such persons as are here contemplated are not of the class who would readily desire to evade justice by leaving their homes and escaping elsewhere; their lack of means would make it difficult for them even if they wished to do so; and if they made the attempt the risk that they might succeed in altogether evading the vigilance of the police is probably not very great. If there is in some cases a risk that the interests of justice might possibly suffer by reason of an increased readiness to grant bail, the object of diminishing the number of cases in which innocent persons are imprisoned is of so great importance that the risk should be taken."

Justices have no right to grant bail to a person charged with treason. In felonies and misdemeanours payable out of the county funds—that is to say since the passing of the Costs in Criminal Cases Act, 1908, in practically all misdemeanours



committed for trial—they may refuse bail or grant it in their discretion.

If the justices commit a defendant for trial for a misdemeanour and do not grant bail, they must inform the defendant that he may apply for bail to a judge of the High Court (Criminal Justice Administration Act, 1914, s. 23).

### ASSIZES OR QUARTER SESSIONS?

A number of indictable offences can only be dealt with at Assizes and must not be committed to Quarter Sessions. Chief amongst these are murder and cognate offences including attempts and aggravated wounding, manslaughter, perjury, procuration, rape, certain forms of robbery, abductions, carnal knowledge of young girls and most forms of forgery.

By the Assizes Relief Act, 1889, defendants charged with an offence which can be dealt with at Quarter Sessions should not be sent to the Assizes unless there are special reasons for doing so, such as the unusual gravity or complexity of the case or the fact that the Assizes precede the Sessions by a considerable time.

By s. 14 (1) of the Criminal Justice Act, 1925, where more than a month must elapse before the next Assizes or Quarter Sessions to which a case would ordinarily be committed, it may be sent to any other Assize or Sessions which will be held between times.

By subsection (5) of the same section, a person who is to be admitted to bail, may be committed to the next Quarter Sessions but one if the next are to be held within five days of the committal.

This is a very useful power and avoids the haste which often accompanies a trial following swiftly upon committal.

## PROCEEDINGS AT THE TRIAL

Except in the rarest circumstances, grand juries were abolished by the Administration of Justice Act, 1933. From the depositions the indictment is drawn and the trial takes place without further formalities before a petty jury.

The work of dealing with committed cases is in almost all cases left to barristers and their clerks. In form trials at Assizes and Quarter Sessions are very similar to summary trials as outlined at page 17.

If the defendant pleads guilty no witnesses need be called and the defendant can be sentenced at once, though of course the court first listens to the story of the crime and what can be said in mitigation.

On a plea of not guilty, prosecuting counsel opens his case with a speech describing the offence and what evidence he will call to prove it. He then calls his witnesses who can be cross-examined by the defendant. These are followed by the defendant and any witnesses he may wish to call. Instead or in addition to giving evidence he may address the jury. When all the evidence has been given the prosecuting counsel may address the court and finally the defendant or his counsel may do so. The Attorney-General or Solicitor-General if present in person has the privilege of making a final speech in reply to the defence.

The judge then sums up the case directing the

jury upon any points of law involved and commenting upon the evidence. The jury then retires and decides whether it finds the prisoner guilty or not guilty. If not guilty he is acquitted and cannot be charged with that offence again. If guilty the judge proceeds to pass sentence.

## CHAPTER IV

### JUVENILE COURTS

PROCEDURE for dealing with juvenile offenders is now regulated by the Children and Young Persons Act, 1933, Part III, and rules made in pursuance of the Act.

### DEFINITIONS

By s. 46 of the Act “no charge against a child or young person, and no application whereof the hearing is by rules made under this section assigned to juvenile courts, shall be heard by a court of summary jurisdiction which is not a juvenile court.”

A “child” is a person under the age of fourteen years and a “young person” is one who has attained the age of fourteen years and is under the age of seventeen (s. 107).

If a child or young person is charged jointly with an adult, the trial must take place in the ordinary court and not in a juvenile court (s. 46 (1) (a) ). If, however, any child or young person so tried is found guilty, he may be remitted for sentence to a juvenile court (s. 56 (1) ).

### AGE OF CRIMINAL RESPONSIBILITY

S. 50 of the Act raises the age of criminal responsibility. No child under eight can now be guilty of an offence. Between eight and fourteen, it is presumed that a child has not reached the age

of discretion and is therefore *doli incapax* (incapable of crime). This presumption, however, is rebuttable. "Malice supplies the lack of age" and there are certainly many children between these ages who know right from wrong and are perfectly well aware that they are committing an offence when doing certain acts.

### AIMS AND OBJECTS

The aims and objects of the juvenile courts are clearly formulated in s. 44 (1). "Every court in dealing with a child or young person who is brought before it, either as being in need of care or protection or as an offender or otherwise shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings and for securing that proper provision is made for his education and training."

The court's chief concern after deciding that the delinquent is guilty of the allegations made against him should be to restore him to the paths of virtue and not to punish him. For this reason s. 59 provides that the words "conviction" and "sentence" shall cease to be used in relation to children and young persons dealt with summarily. "This," says a Home Office circular, "is no mere concession to sentiment but serves to illustrate the principles which should govern the treatment of juvenile offenders. Reclamation should be the object in view. In some cases offences by young people old enough to appreciate the nature of their actions may call for stern measures, but, if so, these measures will be applied for the future welfare of

the young people with appreciation of their temptations and difficulties."

## PROCEDURE

Procedure in juvenile courts up to the time when the magistrates think that an offence is proved or the grounds of an application are established is very similar to the procedure in the adult courts. Once they have reached this conclusion, they are allowed by the rules made in pursuance of this Act to receive as evidence statements in writing from probation officers, the officials of local authorities and medical practitioners who may not be present at court and whose information therefore cannot be questioned. If the court thinks fit neither the defendant nor his parents need be told the contents of these reports. Another rule provides that if the magistrates think it desirable the child or young person or his parents may be required to withdraw from the court.

Of course an advocate may appear in the Juvenile courts on either side as in other courts but he cannot claim as of right to hear and challenge all the information brought to the notice of the court as he would be able to do in the adult courts. Only in very exceptional circumstances, however, would the court withhold information in this way.

## POWERS

Juvenile courts may deal summarily with any child charged with an indictable offence other than homicide and the magistrates need not now obtain

the consent of the parents or guardians of the child (s. 60 and the Third Schedule).

“Young persons” charged with any indictable offence except homicide may also be dealt with summarily but the magistrates must first obtain the consent of the defendant (Summary Jurisdiction Act, 1879, s. 11).

In addition all summary charges against juveniles are dealt with in the juvenile courts. S. 17 of the Summary Jurisdiction Act, 1879 (see page 17), does not apply to a child (see sub-section (3)) but presumably it still does in the case of a young person though the point is not free from doubt.

By s. 62 proceedings may be taken in respect of children or young persons in need of care and protection. Those who come into this category are defined by s. 61. If the court is satisfied that the defendant does in fact need protection, it may, by s. 62, order him to be sent to a Home Office school, commit him to the care of a “fit person” (which includes a local authority), require his parents to enter into a recognizance to exercise proper care and guardianship, or put him under the supervision of a probation officer.

S. 64 allows the parent or guardian of a child or young person whom he is unable to control to bring him to court with a view to his being sent to a school or being placed on probation. S. 65 gives similar powers to a refractory juvenile in a poor law institution.

## PUNISHMENT OF JUVENILES

Juvenile offenders are usually dealt with by fine, probation or by committal to a Home Office

school. A "child" cannot be sent to prison under any circumstances (s. 52 (1) ). Only in exceptional circumstances can a "young person" be sent to prison and then for not more than a month. Where the court thinks other methods unsuitable, it may order him to be detained in a remand home (s. 54). Only where the court can certify that a young person is so unruly or so depraved that he is unfit to be detained in a remand home, can he be sent to a prison (s. 52 (3) ).

Children and young persons convicted on indictment of certain grave crimes may be "detained" for a period to be decided by the judge (s. 53 (2) ).

#### FINE AND COSTS ON PARENT

In any case where the juvenile court can impose a fine and costs, they may (and must in the case of a "child") order them to be paid by the parent or guardian "unless the court is satisfied that the parent or guardian cannot be found or that he has not conduced to the commission of the offence by neglecting to exercise due care of the child or young person (s. 55).



## CHAPTER V

### APPEALS

APPEALS from the decisions of magistrates may be made in several ways. The most common methods are by appeal to Quarter Sessions and by case stated.

A defendant who chooses to appeal by case stated is taken to have abandoned his right to appeal to Quarter Sessions (Summary Jurisdiction Act, 1857, s. 14).

#### (1) APPEAL TO QUARTER SESSIONS

Appeal is made to Quarter Sessions where the facts of the case are in dispute but where no material point of law is in issue. It is in effect a rehearing before the justices at Quarter Sessions; for the whole of the evidence is heard again and the appeal court comes to its decision quite independently of the first court. Colloquially speaking, any defendant aggrieved by the decision of the magistrates in a summary court may try his luck with the magistrates or the recorder at Quarter Sessions.

#### WHO MAY APPEAL

##### 1. *Criminal Convictions*

S. 37 (1) of the Criminal Justice Administration Act, 1914, allows any person convicted of a criminal offence who did not plead guilty to appeal to quarter sessions. This of course includes indictable offences dealt with summarily.

Even if the defendant has pleaded guilty he may appeal to Quarter Sessions against his sentence but not against the conviction (s. 25, Criminal Justice Act, 1925.)

## 2. *Appeals against Probation Orders*

A defendant who did not plead guilty and against whom an order has been made under the Probation of Offenders Act, 1907, may appeal against the order on the ground that he was not guilty of the offence charged (s. 7 of the Criminal Justice Act, 1925).

## 3. *Civil Orders*

There is no general right of appeal against an order made upon complaint to a court of summary jurisdiction. The sections quoted above give general rights of appeal upon criminal convictions. There is no corresponding right in the case of orders—as, for example, against the making of an order upon a relative to support a pauper. An appeal against an order can only be made where an Act of Parliament specially authorises it. For example, rights of appeal are given against orders made in Matrimonial and Bastardy cases. These are dealt with at pages 92 and 105. In London, s. 50 of the Metropolitan Police Courts Act, 1839, allows an appeal to be made against an order to pay a sum of £3 and over.

## 4. *Prosecutors and Complainants*

Prosecutors and complainants have no right of appeal against the dismissal of their cases unless specially permitted by an Act of Parliament.

## PROCEDURE

Procedure is regulated by the Summary Jurisdiction (Appeals) Act, 1933.

1. *Notice*

Notice of appeal must be given within fourteen days of the conviction or decision against which the appeal is made. There is no statutory form for this notice. It must be in writing and should state the general grounds of the appeal. It must be signed by the appellant "or his agent on his behalf."

The notice need not be an elaborate document. Here is a common form—

To the Clerk of the Court of Summary Jurisdiction sitting  
at \_\_\_\_\_ in the County of \_\_\_\_\_  
and to *(the other party)*

I (*appellant's name*), hereby give you notice that I intend to  
appeal at the next quarter sessions to be held at  
on \_\_\_\_\_ 19.. against a conviction of me by the Court  
of Summary Jurisdiction sitting at \_\_\_\_\_ on \_\_\_\_\_ 19..  
for having (state offence)

The general grounds of my appeal are that  
and that I am not guilty of the offence

Signature of Appellant.

The notice must be served on the clerk of the court and the other party. If possible it should be served personally but may be sent by registered letter in which case care should be taken to see that it reaches its destination in time.

Where the appeal is made by two or more defendants joint notices may be given.

2. *Recognizance*

After giving notice, the defendant must enter into a recognizance to prosecute his appeal within

21 days of the decision appealed against. It is noteworthy that the defendant is not now required to undertake as part of his recognizance "to pay such costs as may be awarded by the court of appeal" as was formerly the case. The recognizance may be fixed and taken by any magistrate for the district in which the conviction took place. The amount fixed should be "a reasonable sum, having regard to the purpose of the recognizance and to the appellant's means."

Instead of entering into a recognizance the defendant may deposit with the clerk a sum of money.

If the appellant is in custody he may in the magistrate's discretion be released upon recognizance with or without sureties. Usually one recognizance is taken for the appeal and the appellant's bail.

## POWERS OF QUARTER SESSIONS

When the appeal is heard, neither of the parties is confined to the evidence that was given at the summary court. Quarter Sessions may "confirm, reverse or vary the decision of the court of summary jurisdiction or may remit the matter with their opinion thereon to a court of summary jurisdiction acting for the same petty sessional division as the court by whom the decision appealed against was given. . . . Quarter Sessions may also make such order as to costs to be paid by either party as they think just" (Summary Jurisdiction (Appeals) Act, 1933, s. 1 (vii)).

## ABANDONMENT OF APPEAL

By s. 4 the appellant may at any time up to within two days of the hearing of the appeal give notice to the clerk of the court of summary jurisdiction that he intends to abandon the appeal. In such cases the appellant may be ordered to pay costs for any expenses incurred by the other party in connection with the appeal.

### (2) APPEAL BY CASE STATED

These appeals are taken under the Summary Jurisdiction Acts, 1857 and 1879.

### WHO MAY APPEAL

Either party if dissatisfied or aggrieved with the determination of the magistrates, thinking them wrong on a point of law or that they acted in excess of jurisdiction, may ask them to state a "special case" setting forth the facts of the case and the grounds on which the ruling is questioned.

This applies to all summary proceedings—for civil orders no less than criminal cases and includes indictable offences dealt with summarily but not preliminary examinations of indictable offences (*Foss v. Best*, [1906] 2 K.B. 105). A prosecutor may not be "aggrieved" on the dismissal of his charge but he may be "dissatisfied" and can ask for a case on that ground (*R. v. Newport Justices, ex parte Wright*, [1929] 2 K.B. 416).

### NOTICE OF APPEAL

The application to a court to state a case must be made to the clerk within seven days of the date

of the proceedings questioned. A copy of the application must be left with the clerk of the court for each of the magistrates who were present.

The form of notice may be similar to that shown on page 57 for general appeals. There is no statutory form.

### FORM OF THE CASE

The case must be drawn up within three months of the date of application.

Nominally, of course, it should be drawn up by the court. In practice the first draft is usually made by the appellant's solicitors. This is then submitted to the other side who may suggest alterations. The court then makes the final draft. It is desirable that the form should be agreed in this way so that both the parties and the court feel that the points in dispute have been set out fairly for the High Court's decision.

Examples of the form in which a case should be drawn up will be found in the law reports. All cases cannot be drawn in the same way so that a specimen form cannot be given which would be suitable for all cases.

The case should first state clearly who is the appellant and who the respondent and upon what determination the case is stated.

Then the facts which the court found proved should be set out in proper sequence as tersely and clearly as possible. Next should follow what contentions were put forward on behalf of the appellant and those advanced in favour of the

respondent. Cases referred to in the course of argument should be added.

Finally the decision of the court should be set out and the concluding paragraph should ask the High Court "whether we the said justices came to a correct determination in point of law and, if not, what should be done in the premises."

This document must be signed by all the magistrates who took part in the decision. It then becomes the "Stated Case" and should be handed to the appellant who will within three days transmit it to the High Court for hearing. It may be sent by post to the "Royal Courts of Justice, London."

Before the case is delivered to the appellant he must enter into a recognizance to prosecute the appeal, submit to judgment and pay such costs as may be awarded. If the appellant is in custody he may be liberated on the same recognizance.

The appeal is heard before a Divisional Court sitting in London consisting of three judges of the King's Bench Division of the High Court. They may confirm the decision of the magistrates, or they may quash it or they may remit the case with their directions as to what they think is the proper course for the justices to take.

### REFUSAL TO STATE A CASE

Justices may refuse to state a case if they think the application is merely frivolous. If they do they must give the appellant a certificate of refusal which he can then take to the High Court which may compel the justices to state a case.

The justices may also refuse to state a case if they think no point of law is involved or that the point has already been decided. In these circumstances, they usually treat applications as frivolous and grant a certificate upon which the appellant can obtain the ruling of the High Court.



## CHAPTER VI

### POOR PRISONERS' DEFENCE

IN the same way as many prosperous barristers in their early days were glad to take a dock brief at Assizes or Quarter Sessions in order to gain experience and show what manner of men they were, so may the solicitor setting up on his own account be recommended to have his name placed on the lists of solicitors who are willing to undertake the defence of prisoners in pursuance of the Poor Prisoners' Defence Act, 1930, and the Summary Jurisdiction (Appeals) Act, 1933.

As provided by the regulations, "lists" are kept by the Clerks of Assize and Clerks of the Peace at Quarter Sessions. Any solicitor who desires to have his name added to them should apply to these officials for this to be done. "Poor Prisoner" cases can then be assigned to him.

### DEFENCE CERTIFICATES

For indictable offences which the justices have decided to commit for trial, they may grant a "defence certificate" if they think the defendant's means are insufficient to enable him to obtain legal aid. In cases of murder a certificate must be given if the defendant is without means.

### LEGAL AID CERTIFICATES

Justices may also grant legal aid to defendants whose means are insufficient during the preliminary

examination of an indictable offence or during the trial of a summary offence. In these cases they grant a "legal aid certificate."

### APPEAL AID CERTIFICATES

By s. 2 of the Summary Jurisdiction (Appeals) Act, 1933, an "appeal aid certificate" may be granted by the magistrates to any appellant who has not sufficient means to enable him to obtain legal aid for his appeal.

### PROCEDURE

When one of these certificates is granted, the justices assign a solicitor to the defendant from the "lists." In practice the defendant is usually allowed to make his choice or a solicitor who has his office near the court is selected. Presumably if a solicitor is selected he can be called upon to take the case, though only in exceptional circumstances would a solicitor be required to act against his wishes. If it is inconvenient for him to take a particular case no doubt another solicitor on the list will be willing to do so. But he cannot pick and choose his cases and if he is not willing to take anything that comes along his proper course is to have his name removed from the lists. He can do this by applying to the Clerks of Assizes and Quarter Sessions.

A solicitor who is not on the lists cannot undertake the defence of a Poor Prisoner.

### FEEES

The fee for a solicitor assigned under a "defence certificate" is £3 3s.; for a "legal aid certificate"

£2 2s. and a further fee not exceeding £1 1s. in respect of every day on which an adjourned hearing takes place. For an "appeal aid certificate" the fee is £3 3s.

All these fees at present are increased by 25 per cent.

In addition to these fees, the solicitor may be allowed travelling expenses and other out-of-pocket expenses actually and reasonably incurred.

## CHAPTER VII

### SOME POINTS OF PRACTICE

#### RULES OF EVIDENCE

A GOOD working knowledge of the rules of evidence is essential. Without it we cannot know exactly what parts of a witness's story will be admitted as evidence by a court and what will be ruled out because they are "hearsay" or irrelevant for other reasons. Unless we can foresee how much or how little of the witness's story will be heard by the court, we cannot estimate whether it will be sufficient to win the case or not. Moreover in court points of evidence continually arise and we must be prepared to argue against the inclusion of one item of information which the other side want to bring in and in favour of another which we want to make ourselves and which is resisted by our opponents.

#### EVIDENCE IN CRIMINAL CASES

The rules of evidence are strictly observed in criminal charges. Some latitude is allowed in civil cases where one side may admit certain matters in which event the other side need not prove them. In a criminal prosecution every ingredient of the offence must be strictly proved. The defendant cannot assist the prosecution by admitting any particular fact or facts. For example in a prosecution for bigamy, the two marriages must be strictly

proved—usually by calling witnesses of the ceremonies and producing the certificates. But where a woman is making a complaint for an order under the Summary Jurisdiction (Married Women) Act, 1895—a civil proceeding—she need not strictly prove the marriage unless the husband is challenging its validity. Where he does not, it is sufficient for the wife on oath to say “I married the defendant on a given date” (see page 84).

### WITNESSES WHO CANNOT BE CALLED

Not everybody who has witnessed something which we may wish to prove can be called as a witness. We have a very catholic choice of witnesses but there are some whom we cannot call at all no matter how much they may have seen of the occurrence.

(a) *The King*. We cannot call the King. Nominally, he is the judge in all the courts—the judges and magistrates are his representatives. He cannot therefore be a witness on one side of an issue which he has to judge.

(b) *Idiots*. We cannot call an idiot. But the exclusion applies only to persons who are completely mad. In *R. v. Hill* (1851), 20 L.J.M.C. 222, the judges held that to exclude from the witness box all those who are more or less mentally unbalanced would deprive the courts of many witnesses who could give testimony of value in spite of their deficiency. Thus they explained a man might be mad on one subject but sane on another and if he were asked to give evidence on the subject about which he was sane the courts could receive it.

(c) *Persons who will not take the oath or affirm.* Such witnesses can of course be summoned or arrested on a warrant and if they refuse to take the oath may be imprisoned. Witnesses who have to be coerced in this way, however, are not likely to be very useful and unless they are indispensable, it will hardly be worth while to compel their attendance.

(d) *Children.* In criminal cases a child of tender years who does not understand the nature of an oath may give his evidence unsworn if in the opinion of the court he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth (Children and Young Persons Act, 1933, s. 38). Where the child does not come up to this standard, its evidence cannot be taken. As it is a matter for the court to decide, if we have a child who may be able to give evidence, he should be brought into court when the decision whether he can be sworn or his evidence heard unsworn or not at all will be made by the judge or magistrate.

The unsworn evidence of a child of tender years must be corroborated by some other material evidence. The court cannot act upon his evidence alone.

The unsworn evidence of a child can only be given in criminal cases—never in civil complaints.

(d) *Husband and Wife.* In most criminal charges one spouse cannot give evidence against the other. People talk of their “better halves” in fun but the law of evidence looks on husband and wife as two parts of one whole in all seriousness. Consequently if we make one spouse give evidence against the

other it is much the same thing as making the defendant give evidence against himself.

There are some exceptions to this rule. In the following charges, one spouse can be called against the other if that spouse is willing to give evidence. But he or she cannot be compelled to do so.

Treason, Incest, Rape, Indecent Assault on a female, Bigamy, Abduction, Cruelty to Children (including their murder and manslaughter).

Offences against the Criminal Law Amendment Act, 1885. Offences against the Vagrancy Act of failing to maintain a wife and family or running away and leaving them chargeable to the county councils. Offences against the Unemployment Insurance Act, 1922, s. 11.

In two cases can a spouse be compelled to give evidence against the other—firstly, in charges of personal injury to the spouse by the defendant, *R. v. Lapworth*, [1931] 1 K.B. 117; secondly, in charges of stealing under the Married Women's Property Act, 1882.

### WITNESSES' PROOFS

In all cases of importance it is good practice to put into writing before the case comes into court exactly what the witness is expected to say. In most cases he wants to say a good deal more than the court will ever permit either because it is irrelevant or immaterial. We should endeavour to cut this out beforehand and so save the court's time and also help ourselves to form a fairly correct estimate of the effect the witness's testimony will have divested of the frills and adornments with which he would like to deck it.

When statements have been taken in this way from all the witnesses some estimate of the strength of the whole case can be made and the client advised accordingly.

### HEARSAY

In nearly all cases—in criminal charges, particularly—all “hearsay” must be rigorously excluded. If we find it difficult to detect the “hearsay” in a witness’s statement we should when examining it ask ourselves “Does the statement contain only what the witness saw and experienced with his own five senses and nothing else?” Anything in addition to this should be struck out.

The most common example of hearsay is when a witness in a criminal prosecution endeavours to tell the court a statement made to him by someone else when the defendant was not present. Constables frequently begin their evidence in this way —“I was on duty when Mr. A said to me ‘Mr. B has stolen my watch.’” The court does not want to hear this from the constable because if necessary Mr. A can be called himself to say what he saw Mr. B do. It is better that the court should hear this direct from Mr. A than indirectly through the constable who may have misunderstood Mr. A’s story.

One reason why the courts exclude “hearsay” is because it is not the best evidence. The best evidence is always the evidence of a witness who actually saw happen or heard said what it is desired to prove. Then, again, the court not only wants to know what a witness has to say but it also wants to see what manner of man he is and



to observe how he gives his evidence and from this to consider how much weight it should give to his testimony. When Sam Weller wanted to tell the court what the soldier said, he was very properly silenced by the judge. If it had been essential to Mr. Pickwick's case that the court should know what the soldier said, Mr. Pickwick's advisors should have called the soldier to tell the court directly what he had to say—not through the exuberant and possibly not very reliable Sam Weller. In the box the soldier could have been cross-examined and the court would have been able to see whether this celebrated, anonymous warrior was a witness to inspire confidence in the way he gave his evidence or not.

### DYING DECLARATIONS

But in some cases a statement is made by a person who cannot be called and yet it may be most important in the interests of justice that the statement should be given in evidence. In two criminal charges where this may happen the strict rule excluding "hearsay" is waived. These are charges of murder and manslaughter.

A person who has been murdered or wrongfully killed may before dying say something about the way in which he met his death which may be of vital importance later if someone is tried for that person's murder or manslaughter. The dead man cannot attend the trial and if we do not relax the rule of "hearsay," any statements the murdered person may have made would be inadmissible unless the person later charged were present at the time they were made. An exception has therefore

been made in these cases. If a dying person makes a statement, it may later be given in evidence by the person to whom it was made. But before the court will allow it to be given it must be satisfied that the person who made it knew he was dying and had given up all hope of recovery. The theory is, of course, that a man who is face to face with death will not tell lies and therefore the usual test of cross-examination is not needed. It is not essential, however, that the person should be told point blank that he is dying and must give up all hopes of recovery. The court can infer from evidence of his general state and his knowledge of his condition that he realised his hopeless plight.

Where a dying man's assailant has been charged before his victim has died, there is no need to rely upon a dying declaration. The defendant can be taken to the bedside of the dying man who can be sworn in the presence of a magistrate and his deposition taken in the ordinary way. If at the trial the witness has since died or is too ill to travel his deposition can be read in his absence.

### COMPLAINTS OF SEXUAL ASSAULTS

Another class of "hearsay" which is admitted is the complaints of women and young persons of both sexes after sexual assaults have been made upon them. The fact that a complaint has been made can of course be given in evidence in all cases but only of the fact—not its actual terms. Suppose Mrs. A has smacked Mrs. B's face. Mrs. B complains to a constable and tells him all about it. The constable can say in the witness box that Mrs. B did in fact make the complaint but he

cannot tell the terms of the complaint—what Mrs. B actually said. But suppose Mrs. B instead of complaining of physical assault complained of a sexual assault then the constable could tell the court exactly what she said provided Mrs. B made her complaint to him as soon as possible after the assault had happened. This rule applies in charges of rape, carnal knowledge and indecent assault including offences against boys under sixteen.

Such a complaint is admitted because it shows that the complainant behaved after the assault in a way we should have expected. Under the old law if a woman charged a man with rape she had to show that immediately afterwards she raised a hue and cry. Her immediate complaint now corresponds to some extent with the old time “hue and cry” and if she did not make one, the courts may very seriously question her trustworthiness.

It is important however to remember that such a complaint is not evidence of the truth of the complainant’s allegation but only of the conduct of the person making it.

### RES GESTAE

Sometimes statements which would otherwise be irrelevant are admissible because they are part of the *res gestae*. By *res gestae* we mean the things done in the course of a transaction. We do not often hear arguments upon the matter in police courts. They are usually confined to more erudite tribunals but in a large number of cases details are given in evidence which are not really part of the case and only admitted because they are *res gestae*. For instance, in *R. v. Ellis* (1826), 6 B. & C., 145,

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the prisoner was charged with stealing six marked shillings but in addition to bringing evidence of this, the prosecution showed that he also took other coins not part of the charge. This was admitted because the taking both of the marked shillings and the other coins was part of the one transaction. It is very rarely that any protest is made against the inclusion of additional evidence like this but when it is sought to include statements made during the transaction a good deal of opposition may be anticipated. Generally if the statement is made as part of the transaction which is the subject of the legal enquiry it may be given in evidence although not made in the defendant's presence.

### STATEMENTS MADE IN THE DEFENDANT'S PRESENCE

Such statements if relevant to the case are always admissible; not however because they bear any evidential value in themselves but because the response the defendant makes to them illustrates his state of mind. For instance, the fact that a prosecutor says to a defendant "You have stolen my watch," does not help to prove the larceny of the watch. But the prisoner's response to the accusation may greatly help; as, for example, if he makes an equivocal reply or if he lies or if he breaks down and admits the accusation.

### OPINION

The opinion of a witness is generally irrelevant. It is for the witness to tell the court the facts as

far as he knows them and to allow the court to form opinions from them.

The most common exception is the expert witness who is called to give the court the benefit of his specialised knowledge—the doctor, veterinary surgeon, handwriting expert. But opinions on certain matters may be given in evidence by witnesses who are not experts such as identity, age, appearance or the resemblance of persons or things.

### SIMILAR OFFENCES

Evidence that a defendant has committed similar offences to that with which he is accused is generally inadmissible. But when a person is charged with an offence in which the prosecution have to show that he did the acts alleged with a guilty intent, they may give evidence of other similar acts to show that such a guilty intent existed.

When there is a question whether an act is accidental or intentional, evidence may be given of similar occurrences. “The tendency of such evidence is to prove and to confirm the proof already given” (Pollock, C.B.). This principle has often been invoked in charges of poisoning and arson.

For instance in *R. v. Geering* (1849), 18 L.J.M.C. 215, the defendant was charged with poisoning her husband. After it was proved that the poison had actually been administered evidence was called to show that other members of her family had died from poison after food prepared by her. This evidence was admitted to prove that the poisoning of the husband was not accidental.

## ADMISSIONS AND CONFESSIONS— CRIMINAL CHARGES

The admission of a defendant to a criminal charge of a fact which the prosecution must prove as part of the case may be given in evidence by the person who heard the admission made. So also may his full confession of guilt. But before the court can receive such admissions or confessions, it must be satisfied that they were made voluntarily and not as a result of promises or threats used by a "person in authority." "Persons in authority" are the prosecutor, officers having the prisoner in custody, magistrates and other persons in similar positions. The employer of the prisoner is not a "person in authority" unless he is also the prosecutor.

Facts discovered as a result of statements made by a defendant improperly obtained by a "person in authority" are nevertheless admissible in evidence. In *R. v. Gould* (1840), 9 C. & P. 364, a police officer induced a defendant accused of burglary to make a confession which was later deemed to be inadmissible because wrongfully obtained. In the statement the defendant said that he had thrown a lantern into a pond. The fact that he said this and that the lantern was found in the pond was allowed to be proved.

## THE DEFENDANT IN THE WITNESS BOX

In civil complaints both the defendant and his wife are competent and compellable witnesses for the complainant.

The defendant cannot be compelled to give evidence in criminal charges but he can elect to do so if he wishes. If he does so his position is regulated by the Criminal Evidence Act, 1898. If he fails to give evidence or to call his wife, the prosecution must not comment upon his failure. In the witness box he may be asked questions about the offence with which he is charged although they may tend to incriminate him.

But only in exceptional circumstances can he be asked about previous convictions or charges. S. 1 (f) of the Act allows such questions where—

(1) The proof that the defendant has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(2) He has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(3) He has given evidence against any other person charged with the same offence.

## ONUS OF PROOF

In all cases—civil and criminal—the party which seeks to rely upon a particular fact must prove it. As Mr. Justice Stephens says tersely early in his great *Digest of the Law of Evidence*—“He who affirms must prove.”

In criminal cases the prosecution must prove to



the court beyond reasonable doubt that the defendant is guilty of the offence with which he is charged. Moreover this requirement—the onus or burden of proof as it is called—never passes from the prosecution to the defence. This principle of our criminal law was recently reaffirmed in the case of *R. v. Woolmington* (1935), *The Times*, 23rd May, 1935. In giving judgment Lord Sankey, the Lord Chancellor, said, “If at any period of a trial it was permissible for the Judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the Judge in such a case to say that the jury must in law find the prisoner guilty and so make the Judge decide the case and not the jury, which was not the common law. While the prosecution must prove the guilt of the prisoner, there was no such burden laid on the prisoner to prove his innocence, and it was sufficient for him to raise a doubt as to his guilt; he was not bound to satisfy the jury of his innocence.”

In a few instances the prosecution has been relieved of the task of proving certain facts of the case by Act of Parliament. Thus by the Aliens Restriction Act, 1914, s. 1 (4) the prosecution is not required to prove that the defendant is an alien. The onus of proving that the defendant is not an alien is placed upon the defence. Similarly by the Vagrancy Act, 1898, where a man is proved to be living with a prostitute, he is to be deemed to be knowingly living on her immoral earnings, “*unless he can satisfy the court to the contrary.*”

### “MENS REA”

*Mens rea* means “a guilty intent.” In most serious criminal offences it must be shown not only that the defendant committed the acts which constitute the offence but also that he did them with a guilty intent. Stealing, for example, is a taking plus a guilty intent. We may take something quite innocently but if we take it knowing it does not belong to us, intending to deprive its rightful owner permanently of it, then we have not only taken that thing but have also stolen it.

Furthermore, the guilty intent must be an intent to commit the crime and nothing short of it. If, for instance, we take a motor-car not intending to deprive the owner permanently of his property but only temporarily whilst we go for a joy ride, there can be no conviction for there is here no guilty intention to commit a larceny as technically understood by the law. For the intention to deprive temporarily is insufficient to constitute larceny. It must be a permanent deprivation.

We shall generally be able to discover in what charges it is necessary to prove *mens rea* by carefully reading the wording of the indictment or charge. In practically all we shall find a word or phrase which will indicate that the guilty intent must be present; such words, for example, as “wilfully,” “knowingly,” “maliciously,” “fraudulently,” “with malice aforethought,” “with intent to defraud,” and so on.

In many criminal charges the defence is able successfully to argue that the *mens rea* is absent or that the prosecution have failed to show its

existence. In charges of stealing motor-cars as shown above it may be contended that they were taken only temporarily although this is now in itself an offence by s. 28 of the Road Traffic Act, 1930. Similarly in charges of embezzlement it may be shown that the defendant got muddled in his accounts and mixed in his moneys, serious shortcomings in a clerk but not criminal offences. Many cases of larceny can be shown to be nothing more serious than illegal pawning.

### OUSTER OF JURISDICTION

In general the magistrates have no jurisdiction to try questions of right or title. If a case which comes before them proves to be mainly a question of right or title their jurisdiction is ousted—in other words, they have no right to try the case but should dismiss it for the parties to take the question for decision to the civil courts. Instances of this usually arise in charges of wilful damage, assault and larceny. Before dismissing a case in which such a question has arisen the justices should first make sure that the claim is made in good faith and not in order to avoid a conviction upon a charge properly made against a wrong-doer.

CHAPTER VIII  
MATRIMONIAL JURISDICTION  
APPLICATION BY WIFE

THE Summary Jurisdiction (Married Women) Act, 1895, allows the magistrates to make separation or maintenance orders upon the complaint of a wife against her husband upon the following grounds—

1. That he has been convicted summarily of an aggravated assault upon her.

2. That he has been convicted upon indictment for an assault upon her and sentenced to pay a fine of more than five pounds or to a term of imprisonment exceeding two months.

3. That he has deserted her.

4. That he has been persistently cruel to her.

5. That he has wilfully neglected to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain.

To these grounds later Acts have added others.

By s. 5 (1) of the Licensing Act, 1902, "Where the husband of a married woman is a habitual drunkard, she shall be entitled to apply for an order."

By s. 1 (2) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the wife may apply for an order on the grounds that—

1. Her husband has been guilty of persistent cruelty to her children.

2. Her husband while suffering from a venereal

disease, and knowing that he was so suffering, insisted on having sexual intercourse with her.

3. Her husband has compelled her to submit herself to prostitution.

## APPLICATION BY HUSBAND

Upon two grounds the husband can apply for an order.

By s. 5 (2) of the Licensing Act, 1902, "Where the wife of a married man is a habitual drunkard, he shall be entitled to apply for an order."

By s. 1 (3) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, "a married man may apply for an order or orders on the ground that his wife has been guilty of persistent cruelty to his children."

## TO WHAT COURT

Proceedings must be taken at the court within whose jurisdiction the cause of complaint alleged wholly or in part arose. For assaults this is the jurisdiction in which the conviction took place. For persistent cruelty, it will be the jurisdiction within which one of the acts of cruelty took place—the court in which the woman is living may not have the right to deal with the application. Desertion and neglect to maintain have been held to be continuing causes of complaint. The woman is deserted or neglected in whatever jurisdiction she happens to be and may therefore apply to the court for the area in which she is living at the time when she decides to make the application.

### TIME LIMIT

The six months limit under the Summary Jurisdiction Acts (see page 11) applies to complaints based on assaults and persistent cruelty. The application for a summons must be made within six months of the assault or the last act of cruelty. Desertion or neglect to maintain being "continuing courses of conduct," there is no time limit.

### PROCEDURE GENERALLY

Procedure to obtain an order is very similar to that for other complaints which magistrates are empowered to hear and is governed generally by the Summary Jurisdiction Acts.

The complainant or her representative applies to a magistrate for a summons upon one or more of the grounds set out above and a date is fixed for hearing. If the defendant does not appear the case is usually dealt with in his absence upon proof of the service of a summons. A warrant may be issued to compel his attendance upon proof of the service of the summons but this is rarely done.

The magistrates first hear the wife and her witnesses and then, if they think a case is made out, the defendant and his witnesses. They then decide whether the complainant has made out her case and if so proceed to make an order in her favour. If they decide that she has failed to do this, the summons is dismissed.

In the rare cases where the husband takes proceedings he is of course the complainant and the onus of proof is on him.

## PROOF OF MARRIAGE

Unless the validity of the marriage is challenged by the defence, the complainant need not prove the marriage in the strict way required in a criminal prosecution. It is very rarely that the marriage is questioned and, if it is not, it is sufficient for the complainant to say "I married the defendant on a given date." If the defendant does question the marriage, it can be proved by the production of a marriage certificate and failing that by calling witnesses who were present at the ceremony upon which the complainant relies.

## AGGRAVATED ASSAULTS

The Offences against the Person Act, 1861, s. 43, defines an aggravated assault as "an assault of such an aggravated nature that it cannot be sufficiently punished under the provisions as to common assaults and batteries." Heavy penalties may be imposed for such assaults but sometimes in the interest of the wife the justices whilst convicting the husband of an aggravated assault impose a penalty no greater than they might have imposed for a common assault. This, however, is no bar to an order which the convicting court may make forthwith or upon a summons fixed for a later hearing.

## ASSAULTS ON INDICTMENT

This may be for any offence involving an assault. For instance, in *R. v. Knowles* (1900), 65 J.P. 27, the husband was convicted of throwing vitriol at his wife and was sentenced to eighteen months

imprisonment. Mr. Justice Darling made an order for separation.

The order may be made by the convicting court which for the purpose becomes a "court of summary jurisdiction"; or it may be made by magistrates in a summary court for the area in which the conviction took place.

### DESERTION

"Desertion" has been defined as "the actual and wilful bringing to an end of an existing state of cohabitation without the consent of the other spouse and without just and reasonable cause" (*Fitzgerald v. Fitzgerald* (1869), L.R. 1 P. & D. 694).

If the parties mutually agree to separate there can be no desertion but the husband may find himself liable on the ground of "neglect to maintain" (see page 87).

It is often important to ascertain how the cohabitation was brought to an end. Separation for a reasonable or lawful cause does not put an end to cohabitation at all—as for example, a soldier husband ordered abroad, a wife going away for her health, a husband leaving home to seek for work. In these cases the couple though physically separated, are still cohabiting in the legal meaning of the term. If, however, the separation is needlessly prolonged when it might be ended, the spouse responsible for the delay may be held to have deserted the other.

There may sometimes be desertion under the same roof; where for example the husband shuts himself away from his wife. The statute does not require the husband to take himself off to a separate dwelling house.



The husband cannot be held to have deserted his wife if he has left her "with just and reasonable cause." This must be "grave and weighty" (*Yeatman v. Yeatman* (1868), L.R. 1 P. & D. 494). But it may be "conduct falling short of a matrimonial offence."

A bona fide offer to return on the part of the husband puts an end to his desertion. If the wife refuses to take him back she has no grounds upon which to persist with her complaint—provided always of course that the court believes that the husband is genuinely anxious to make a fresh start and is not making a perfunctory offer as a tactical move to defeat the wife's application.

### PERSISTENT CRUELTY

One act of cruelty however severe is not sufficient to constitute persistent cruelty. In such a case the appropriate remedy would be proceedings for assault (see above). There is some authority for saying that an order may be made for a number of acts of cruelty committed on one day. Generally, however, the courts look for a course of cruel conduct lasting over some time in these cases.

The cruelty must either have caused bodily injury to the wife or have caused reasonable apprehension of suffering or injury to her health. There may be mental cruelty as well as physical. For instance, in a case where the husband brought another woman into the house, committed adultery with her and compelled his wife to wait on his paramour, this was held to be sufficient to establish persistent cruelty (*Fenwick v. Fenwick* (1922), 38 T.L.R. 603).

If the wife forgives certain acts of cruelty and later the husband commits further violence, she may give evidence of the earlier acts as well as the later.

### NEGLECT TO MAINTAIN

The neglect must be *wilful*. In all cases it must be shown that the husband has had the means to support her and has wilfully failed to do so. The maintenance that the wife requires must be reasonable and in accordance with his income. If she demands more than he can reasonably afford she is not entitled to an order.

The wife is not entitled to an order if she has not fulfilled her part of the matrimonial contract. If she leaves her husband without good cause or has unreasonably refused him marital rights, she has no cause of complaint.

Until recent years it was held that when a married couple separated by formal agreement, the wife could not ask for a police court order if later the man failed to keep the agreement. A number of recent cases have modified this ruling. In *McCreaney v. McCreaney* (1928), 138 L.T. 671, it was held that where the husband failed to pay his wife as agreed in a deed when he had the means to do so, the wife could take proceedings for "neglect to maintain." The test appears to be whether the prisoner has defaulted under the deed wilfully or not. If wilfully he lays himself open to police court proceedings.

### HABITUAL DRUNKENNESS

A habitual drunkard is defined by s. 3 of the Habitual Drunkards Act, 1879, as "A person who,

not being amenable to any jurisdiction in lunacy, is, notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself, and his or her affairs." By s. 3 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the definition is now to be read as if "the reference to the habitual intemperate drinking of intoxicating liquor included a reference to the habitual taking or using, except upon medical advice, of opium or other dangerous drugs within the meaning of the Dangerous Drugs Acts, 1920 and 1923."

### POWERS OF THE COURT

If the magistrates come to the conclusion that the wife has made out her case, they may make one or more of the following orders—

(a) "A provision that the applicant be no longer bound to cohabit with her husband."

If this provision is included the order is called a "Separation Order." If not, it is called a "Maintenance Order." To-day separation orders are not often made except where the woman has reason to fear violence from the husband. In recent cases the judges have strongly condemned the making of Separation Orders where there are no special circumstances to justify it.

(b) "A provision that the legal custody of any children of the marriage while under sixteen be committed to the applicant."

In most cases the children are given to the mother unless she is an unsuitable guardian. In all cases the deciding factor should be the welfare

of the children. If they are given to the wife, the husband may be ordered to pay a weekly sum not exceeding 10s. for each child in addition to the sum he is ordered to pay his wife.

(c) "A provision that the husband shall pay to the applicant personally, or for her use to any officer of the court or third person on her behalf, such weekly sum not exceeding two pounds as the court shall, having regard to the means both of the husband and wife, consider reasonable."

(d) "A provision for payment by the applicant or the husband, or both of them, of the costs of the court and such reasonable costs of either of the parties as the court may think fit."

These provisions appear in s. 5 of the Summary Jurisdiction (Married Women) Act, 1895. When the Act was passed only the wife could be an applicant. Where the husband is the applicant, similar orders can be made.

## ADULTERY

By s. 6 of the Summary Jurisdiction (Married Women) Act, 1895, "No orders shall be made on the application of a married woman if it shall be proved that such married woman has committed an act of adultery: Provided that the husband has not condoned, or connived at, or by his wilful neglect or misconduct conduced to such act of adultery." After an order is made, by s. 7 of the same Act—"If any married woman shall commit an act of adultery such order shall upon proof thereof be discharged."

The first section recognised that there might be an excuse for a wife who commits adultery where

the husband has in part been responsible for her action; but once an order was made, no lapse could be excused. If the husband failed to pay the order, the wife's remedy was to bring him to court to enforce payment, not to maintain herself by immorality. The harshness of this enactment has been modified by s. 2 (1) of the Summary Jurisdiction (Separation and Maintenance) Act, 1895, which adds the following proviso to s. 7 of the earlier Act—

Provided that the court may, if the court think fit—

- (a) refuse to discharge the order if, in the opinion of the court, such act of adultery as aforesaid was conducted to by the failure of the husband to make such payments as in the opinion of the court he was able to make under the order; and
- (b) in the event of the order being discharged, make a new order that the legal custody of the children of the marriage shall continue to be committed to the wife, and that the husband shall pay to the wife, or to any officer of the court or third person on her behalf, a weekly sum not exceeding ten shillings for the maintenance of each child until sixteen.

There is no time limit within which proceedings to discharge an order on the ground of adultery must be taken.

## RESUMPTION OF COHABITATION

If the parties resume cohabitation the order ceases to have effect. If later they part company again, the wife cannot rely on the first order but must apply for a new one if she has the grounds.

## PARTIES RESIDING TOGETHER

An order may be made in favour of a wife who is residing with her husband but “no order shall

be enforceable and no liability shall accrue" whilst they are so residing together and "any such order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband" (Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4) ).

### VARIATION OF ORDERS

By s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, "a court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which any order under this Act has been made, may on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary or discharge any such order and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made so that the same do not exceed the weekly sum of two pounds."

An order can only be varied by the court which made it. This is a very good rule because the court which made the order will have a record of the facts upon which it was made and of the earnings upon which the weekly payments were assessed. At times however it causes great hardship as for example, where the one of the parties has gone to live at some distance from the court which made the order.

There is no time limit for applications to vary or discharge an order.

## ARREARS

Payment of arrears is enforced in the same way as arrears on an affiliation order (see page 103).

## APPEALS

S. 11 of the Summary Jurisdiction (Married Women) Act, 1895, provides that "save as hereinbefore provided, an appeal shall lie from any order or the refusal of any order by a court of summary jurisdiction under this Act to the Probate, Divorce and Admiralty Division of the High Court of Justice."

This has generally been construed to include adjudications under s. 7 to vary or discharge an order and refusals to do so.

The appeal is both upon law and fact. Appeal cannot be made by way of case stated (*Manders v. Manders*, [1897] 1 Q.B. 474) except on an information for arrears (*Ruther v. Ruther*, [1903] 2 K.B. 270).

Notice of appeal must be given within eight days of the adjudication appealed against to the other party and the clerk of the summary court. It may be similar in form to that shown on page 57. The appeal must then be entered in the Divorce Registry of the High Court within twenty-one days of the date of adjudication.

GUARDIANSHIP OF INFANTS ACT,  
1925

Under this Act, a wife who is unable to obtain an order against her husband under the Summary Jurisdiction (Married Woman) Act, 1895, or who

does not wish to do so, may make an application for an order giving her the custody of the children of the marriage. If the magistrates grant the application, they may also order the husband to pay his wife any sum they think fit not exceeding 20s. per week for the maintenance of each child.

S. 9 of the Act allows the magistrates to give their consent to the marriage of a person under the age of twenty-one if it is withheld by a person whose consent is required or if the person who normally would be the person to give consent cannot be found or is inaccessible, as, for example, a person in a lunatic asylum.

### OVERSEAS ORDERS

In many parts of the Empire—with Canada as the chief exception—the Maintenance Orders (Facilities for Enforcement) Act, 1920, allows a provisional order to be made in England or Wales and sent to a dominion or colony to which the husband has absconded for confirmation. An order already made in England or Wales may also be sent to a dominion or colony there to be registered. After an order is confirmed or registered it becomes payable as it would have been in this country and can be enforced by the overseas court. Naturally the procedure is cumbersome and slow but many wives have made successful applications under the Act.

Reciprocal legislation allows wives in a dominion or colony to send orders to England and Wales for confirmation.



## CHAPTER IX

### AFFILIATION APPLICATIONS

#### PRIVATE AGREEMENTS

BASTARDY cases are often settled by private agreement. The father admits paternity and agrees to pay so much weekly to the mother for the maintenance and upbringing of the child. A formal agreement is then drawn up and signed by the parties. Such agreements are only enforceable in the county courts and are therefore not so readily and cheaply enforced as a police court order. On the other hand the maximum order that a court can make is 20s. weekly and if the father is well-to-do he may be willing to pay a good deal more than this. It must be remembered, too, that the police court hearing often involves much undesired publicity.

An agreement is not a bar to subsequent police court proceedings even though it expressly stipulates that such proceedings shall not be taken. Further it may be used by the mother as corroborative evidence.

#### POLICE COURT APPLICATIONS

The principal Act under which affiliation proceedings are brought before the magistrates is the Bastardy Laws Amendment Act, 1872. The Summary Jurisdiction Acts do not apply to them except for certain provisions relating to the recovery of arrears after an order is made, appeals and service of process.

## 1. PRELIMINARY PROCEEDINGS

### *Who May Apply*

Proceedings are commenced by application to a magistrate for a summons. The application is usually made by the mother herself with her solicitor if she has one. By s. 5 of the Bastardy Laws Amendment Act, 1873, "when a bastard child becomes chargeable, the guardians (now the officials of the County Councils) may apply. . . ." An application may also be made by any person who for the time being has the custody of the child (Affiliation Orders Act, 1914, s. 3).

### *To What Court*

The application must be made to any one justice acting in the petty sessional division of the county or town in which the mother resides. There are a number of cases in which the meaning of "resides" is discussed. A woman who has no settled place of residence may make application to the justices of the division in which for the time being she happens to be (*Lawrence v. Ingmire* (1869), 20 L.T. 391). But she must not try to pick and choose her tribunal. Where a woman failed to get an order in one jurisdiction and moved into another "because people said if she came there she would have a better chance," it was held that the justices in the second area had no jurisdiction (*R. v. Myott* (1863), 32 L.J.M.C. 138). Generally speaking, the application may be made in whatever jurisdiction the woman happens to be so long as she has not moved into it for a fraudulent or improper purpose.

*Nationality Immaterial*

The nationality of the parties does not matter so long as the child is born in England and the parties are residing in England. The object of bastardy orders is to keep illegitimate children off the rates so that the nationality of the parents is immaterial.

A child born on an English ship was held to be born in England and the mother was held to be entitled to an order, the ship being held to be part of English territory (*Marshall v. Murgatroyd* (1870), 40 L.J.M.C. 7). An order cannot be made in respect of a child born abroad of a foreign woman but one can be made where the child was born abroad and both parents were English because in this case the judges held there was no need to consider any law but English to ascertain the status of the child (*R. v. Humphrys*, [1914] 3 K.B. 1237).

An English court may make an order in respect of a child born in Scotland if the parents when the application is made are within the jurisdiction of the court (Summary Jurisdiction (Process) Act, 1881, s. 6). This, of course, does not allow the mother to make an application to an English court where the father is in Scotland. In that case, she must go to Scotland and take proceedings there.

*Single Woman*

Only a "single woman" may apply for a summons but "single woman" includes not only unmarried women but also widows, women who

have been divorced or judicially separated and in some cases women who are still married.

A married woman who is not cohabiting with her husband may apply for an order because he may not be liable to support the child. But a married couple must not separate in order to obtain an order. It must be a bona fide separation—not a sham (*Jones v. Davies*, [1901] 1 K.B. 118).

A married woman who has had an illegitimate child before marriage cannot apply for a summons after marriage because she is then no longer “single”; nor can she proceed after her marriage with a summons taken out before marriage (*Tozer v. Lake* (1879), 41 L.T. 280).

### *Time of Application*

The application may be made—

- (1) Before the child is born.
- (2) Within twelve months of its birth.
- (3) At any time, if within twelve months of the birth, the father has paid money for the child's maintenance.

(4) Within twelve months of the father's return to England upon proof that he ceased to reside in England within twelve months after the birth of the child. “Ceased to reside” has been held to be a continuing act and where a man left England before the child was born, it was held that the mother could apply at any time up to twelve months after his return (*R. v. Evans*, [1896] 1 Q.B. 228).

The object of making the application before the birth of the child is that if later an order is made the weekly payments may be ordered to commence

from the birth of the child. Sometimes the mother is too ill to get about after the confinement and if she is too ill to make her application within two months, the order can be made to commence only from the day on which it was made.

### *Application on Oath*

Where the application is made before birth the information must be on oath and presumably in writing. In form it may be similar to that shown on page 10. Applications after birth need not be on oath though at many courts these are also made in writing and sworn.

### *The Summons*

If the application is successful, a summons is granted. A warrant cannot be issued. The summons must be served personally or be left at the defendant's last place of abode. The summons must be made returnable within 40 days after the date of service. If the applicant or her solicitor does not appear at court within that time, no order can be made. The summons can of course be adjourned once formal appearance has been made within the time limit.

## 2. THE HEARING

### *Appearance of the Parties*

The mother must appear in support of the application. No order can be made before the court has heard her sworn testimony. If she dies before the hearing no order can be made.

The defendant is not bound to appear. He

cannot be compelled to attend by warrant but an order may be made in his absence upon proof of the service of the summons.

He may also be called as a witness by the mother and in this way compelled to attend by summons or warrant and give evidence (Bastardy (Witness Process) Act, 1929).

### *Married Women—Non Access*

Where the applicant is a married woman whose husband is still alive, the law presumes that any child she may give birth to is the child of the marriage unless she is divorced from him or separated from him by a judicial decree of separation. The presumption is rebuttable. Such an applicant before she can be allowed to give evidence of the illegitimacy of her child must first satisfy the court that the child is not her husband's. She cannot do this by her own testimony for the law will not allow married people to bastardise their own children. She can do it however by calling other witnesses who must be able to show either that it was physically impossible for the husband to be the father or failing this that it was highly improbable.

Where for instance the husband has been serving a term of imprisonment at the time when conception must have taken place, a warder from the prison may be able to satisfy the court that the husband could not have been the father. Similar cases arise where it can be proved that the husband has been on active service or on foreign station.

In other cases the courts have also held that the husband cannot have been the father where the

complainant has not been able to establish "non-access" so completely. The applicant need not go so far as to show that it was impossible for the husband to be the father. It is sufficient if she can produce evidence which will show that it was highly improbable.

For instance, if it is shown that the mother has been living with the putative father for some time whilst her husband has never been seen near her, this would probably be sufficient to rebut the presumption of legitimacy. In *Atchley v. Sprigg* (1864), 10 L.T. 16, the mother had left her husband for some years and had been associating with the putative father. When the child was born, the putative father treated it as his own, allowed it to be called by his surname, and helped to bring it up. Here, access by the husband was possible but very improbable and the judges held that there was sufficient evidence of non-access to rebut the presumption of legitimacy.

### *Corroboration*

The mother must not only give evidence herself but in addition must in all cases produce a witness or witnesses who can corroborate her *in some material particular*.

Whether a particular piece of evidence is "corroboration in some material particular" or whether it falls short of this is a problem which has been discussed in many cases on appeal.

No attempt at definition can be made. The corroborative evidence must show not only that the defendant is possibly the father of the child but probably. In most cases the corroboration is

an admission by the defendant to a third party—generally a relative of the woman's—that he is the father. His silence when taxed with paternity may also amount to corroboration though his failure to answer letters charging him with responsibility would probably not. Letters written by the defendant may often be relied upon but they must be proved by a witness other than the complainant. Admissions of sexual intercourse though not at the material dates have also been held to be corroboration (*Lawrence v. Ingmire* (1869), 20 L.T. 391).

Of course, it does not follow that what has been held to be corroboration in one case will necessarily be sufficient corroboration in another. Everything depends on the particular circumstances of each case. A promise to marry for instance may be sufficient in one case and may fail in another. If made when the defendant was told of the woman's condition, it generally would be corroboration. But if the man made it in a spirit of chivalry to screen the woman whilst at the same time denying responsibility, it might not.

### *Corroboration not Needed for Application*

Some courts will not grant a summons until they are satisfied that the mother has already obtained corroborative evidence. This practice is not correct as the corroborative evidence is required at the hearing but not upon the application. The defendant sometimes denies paternity until he is actually brought to court when he may think it best to persist in his denials no longer especially if required to give evidence. He may whilst still persisting in his denials so behave in court and in



the witness box as to leave no doubt of his responsibility in the minds of the justices. Furthermore, whether certain evidence amounts to paternity or not is a question which the magistrate asked to grant a summons may answer negatively and which the magistrates who later decide the case may answer affirmatively. In fairness to the applicant, then, she should not be required to produce corroborative evidence until the hearing though of course it is an excellent practice to warn her when granting the summons that it will be required at the hearing.

### *The Defendant's Evidence*

After the mother and her witnesses have been heard should the court find a *prima facie* case against the defendant, he may give evidence and call witnesses if he wishes. When all the evidence has been heard, the court may make an order or dismiss the application.

In these cases, the magistrates have two main questions to determine. First, has the mother been corroborated in a material particular? Then, if it is decided that she has, comes the second—having heard both parties whose story is probably the true one? Sometimes the justices preoccupied with the search for corroboration forget the second and more important question which it should be the aim of the defending solicitor to stress.

### *Dismissal of the Application*

If the application is dismissed the dismissal is not final. The woman can apply again if she gets

further evidence later—subject of course to the time limits as set out on page 97.

The magistrates however would grant a new summons only when they were satisfied that the mother had got additional evidence of a very valuable character.

### *Orders—Powers of Magistrates*

If the justices find in favour of the mother they may make an order that the defendant pay—

(1) A weekly sum not exceeding 20s. per week (Bastardy Act, 1923, s. 2).

(2) The expenses incidental to the birth.

(3) The applicant's costs.

The weekly sum may be ordered to commence from the birth of the child if the application was made before birth or within two months of it.

## 3. PROCEEDINGS AFTER THE MAKING OF THE ORDER

### *Jurisdiction for Enforcement*

The mother may apply for process to enforce the arrears to any court within whose jurisdiction she is residing. She is not limited to the court which made the order. A "collecting officer" if the order is payable through him may also take proceedings at his local court (see page 104).

### *Enforcement*

If the defendant fails to pay the order, the arrears are enforceable by distress or committal to prison for a term not exceeding three months.

Proceedings for the enforcement of arrears must not be taken until 14 days after the order is made. Whilst the defendant is in prison for arrears, payments under the order are temporarily suspended unless the court otherwise directs (Criminal Justice Administration Act, 1914, s. 32 (3) ).

The Bastardy Laws Amendment Act, 1872, contemplates the issue of a warrant against a defendant who has fallen into arrears. In practice a summons is usually issued unless the whereabouts of the defendant are unknown. If the defendant fails to appear upon a summons, an order for payment cannot be made in his absence and a warrant to bring him before the court must be issued before he can be committed in default.

There is no time limit within which proceedings for the recovery of arrears must be taken.

### *Collecting Officers*

The Affiliation Orders Act, 1914, allowed "Collecting Officers" to be appointed. Unless the mother wishes the order to be paid direct to her, it must be made payable through the local "collecting officer." He receives the defendant's weekly payment and then hands or sends it on to the complainant.

This has proved an excellent practice because the accounts are properly kept and the mother is not compelled to meet the applicant if she does not want to.

The "collecting officer" is also entitled to take proceedings to enforce arrears on receiving a request in writing from the mother.

*Variation of Orders*

By s. 30 (3) of the Criminal Justice Administration Act, 1914, "Any order . . . upon cause being shown to the satisfaction of the court, may be revoked, revived or varied by a subsequent order."

By s. 9 of the Money Payments (Justices Procedure) Act, 1935, it is now no longer necessary to produce "fresh evidence" before an order can be reviewed under s. 30 (3).

Only the order for payment can be varied. The finding of paternity stands and can only be upset on appeal. Even where the complainant is later convicted of perjury in obtaining the affiliation order, the finding of paternity remains though legislation to put an end to this anomaly is contemplated.

## COSTS

Costs can be awarded in the discretion of the justices to either of the parties both upon the application for an order and for a variation of the order (Criminal Justice Administration Act, 1914, s. 31).

## APPEAL

By s. 37 (2) of the Criminal Justice Administration Act, 1914, "an appeal shall lie to a court of quarter sessions in manner provided by the Summary Jurisdiction Acts from any order made by a court of summary jurisdiction under the enactments relating to bastardy, or from any refusal by a court of summary jurisdiction to make such an order, or from the revocation, revival or

variation by a court of summary jurisdiction of such an order.”

It is to be noticed there is no appeal against a refusal to vary an order.

The procedure in bastardy appeals is similar to ordinary appeals from justices to Quarter Sessions (see page 55). Appeal may also be by case stated (see page 59).

## CHAPTER X

### LICENSING LAW AND PRACTICE

THIS subject is too wide to be fully covered in these pages which must be mainly confined to the grant of new licences and the transfer of licences upon a change of tenant.

#### (1) NEW LICENCES

All persons who retail intoxicating liquors (except wholesale dealers in spirits licensed to retail in bottle) must first obtain a justices' "licence" which authorises the excise officials to grant the holder an excise licence. Without these, the retailer renders himself liable to heavy penalties.

Justices' certificates are granted exclusively at the General Annual Licensing Meeting, which must be held in the first 14 days of February. The justices may adjourn the meeting or any particular application.

The licensing bench may in their discretion authorise the applicant to apply for one of several kinds of excise licence. A "Full licence," for example, authorises the sale of spirits, beer, cider, wine, sweets on or off the premises; a "Beer on-licence," beer and cider on or off, and so on.

#### APPLICATION FOR A NEW LICENCE

When we are instructed to obtain a new licence for a client, the first thing is to see that the premises

to be licensed are properly qualified. For a full licence including spirits, the house must contain, exclusive of private rooms, *two rooms* for the use of the public, and, a house for the sale of liquors other than spirits, *one* such room. The premises must also be structurally adapted for the business.

## NOTICES

Notice of the application must be given to the rating authority of the district in which the new house is to open, to the clerk of the licensing justices and to the superintendent of police, 21 days at least before the application. It must contain the name, address and description of the applicant; a description of the licence or licences for which he intends to apply; the address of the proposed premises, particulars of rent and the name of the owner. An advertisement of the application containing similar information must be put in a local paper on some day not more than four and not less than two weeks before the application is made.

Similar notices must also within 28 days of the application be displayed on two consecutive Sundays on the proposed premises and on the church or chapel for the area.

If the application is for an "On" licence a plan of the premises must be deposited with the clerk to the licensing justices within 21 days of the Annual Meeting.

The notices may be served by registered post.

The application must be made by a person of good character and supported by testimonials.

## CHARACTER OF THE ANNUAL LICENSING MEETING

The general annual licensing meeting is not a "court of summary jurisdiction." It is doubtful if it is a court at all. Except for applications for the renewals of licences, the evidence need not be an oath and the justices may act upon their own knowledge of the neighbourhood and the suitability of the particular premises. The meeting must be held in public and the magistrates must act in a judicial spirit. Any local inhabitant has the right to oppose the grant of a new licence. Applications are decided by a majority of the justices. They have no power to award costs.

## CONDITIONS OF NEW LICENCE

By s. 14 of the Licensing Act, 1910, the justices when granting *a new on-licence* may attach conditions as to payments to be made, the tenure of the licence, and any other matters they think proper in the interests of the public and one of the conditions to be attached is the payment of monopoly value which is represented by the difference between the value which the premises will bear when licensed and the value when not licensed.

Instead of granting a new licence as an annual licence, they may do so for a term not exceeding seven years during which time the licence will not require renewal. At the expiration of the licence however, an application for a further period will not be treated as a renewal but as a new application.



## CONFIRMATION

In counties, a grant of a new licence, whether on or off, is not valid unless confirmed by Quarter Sessions; in boroughs, not until confirmed by the whole body of borough justices as the confirming authority.

Before a new licence can be confirmed it will be necessary for the "Monopoly Value" to be settled by the Licensing Justices at a meeting called for that purpose.

Immediately a new licence is granted, application should be made to the clerk of the peace for the county or the clerk to the borough justices, as the case may be, for a copy of the regulations regarding the confirmation. These regulations may slightly differ in each county but in most cases, the confirming authority will require the magistrate's licence, the plans, memorials and other documents produced before the justices, to be sent to the clerk of the peace. The confirming authority may also require evidence of the annual value of the premises and other particulars. An application for confirmation cannot be heard until after the expiration of twenty-one days from the date of the grant.

PROVISIONAL LICENCES FOR NEW  
PREMISES

So far we have been dealing with applications for licences in respect of premises already erected. By s. 33 of the Licensing Act, 1910, it is provided that any person interested in any premises about to be or in course of being constructed for the

purpose of being used as a house for the sale of intoxicating liquors to be consumed on the premises, may apply to the licensing justices and to the confirming authority for the provisional grant and confirmation of a licence in respect of such premises about to be built and the justices and confirming authority, if satisfied with the plans submitted to them may make such provisional grant and order of confirmation when the building is completed in accordance with the plans submitted to the Licensing Justices. Such provisional grant before it is valid, must be declared final by an order of the Licensing Justices.

The requirements for obtaining a provisional licence are in every way identical with those for obtaining a new licence, including the satisfying of the justices of the suitability of the proposed licence holder. If, however, there is no door, notice must be put up in a conspicuous position on the site.

The application must be made at the general annual licensing meeting, or an adjournment of the meeting but the final licence may be given at any time. The final licence does not need confirmation.

## (2) TRANSFERS

Often a solicitor is called upon to act on behalf of a client who is taking over licensed premises from the present tenant. When the change takes place he should obtain from the outgoing tenant—

(1) The excise licence, endorsed as follows—

I, A B, the within mentioned licensee hereby assign all my right and interest in this licence to D E.

(Signed) A B.

Witness to the Signature X Y.

(2) The justices' licence.

(3) The incoming tenant's signature to the notice of application for temporary authority set out in duplicate, one to be served on the police and one on the clerk to the Licensing Justices.

(4) The outgoing tenant's signature to the notice of application for transfer in triplicate, one for the police, one for the local authority and one for the clerk to the Licensing Justices.

The incoming tenant should be able to furnish the names and addresses of two or three people who will be able to speak of his character and fitness to hold a licence.

Except in cases of urgency, 14 clear days' notice must be given to the superintendent of police of the proposed application to enable him to make enquiries about the proposed licensee. The notice must be signed by the licensee or his agent and must furnish the name, address and occupation of the incoming tenant during the past six months. It should be served personally on the superintendent and on the clerk of the local rating authority.

Special sessions are held for the transfer of licences not less than four times and not more than eight times a year. Applications for transfer are considered by the magistrates at these sessions but should it be necessary to make the transfer before the Special Sessions are held, a temporary transfer popularly known as a "Protection Order" can be applied for at any sitting of the magistrates in their ordinary courts. The same procedure is followed in each case. The Protection Order only covers the new tenant until the next Special

Sessions when he must renew his application to obtain a transfer of the licence.

A "Protection Order" is not necessary where the licensee dies and his business is carried on until the next Special Sessions by his executors or administrators; nor in the case of a bankrupt if the business is carried on by the trustee in bankruptcy.

### (3) OCCASIONAL LICENCES

There are two kinds of occasional licences. One allows the licensee to sell intoxicants at premises other than his licensed premises and is permitted by s. 64 of the Licensing Act, 1910. The licensee must apply to the magistrates of the area in which the place at which it is desired to sell the intoxicants is situated. The application must not be for more than three days which the magistrates can extend for another three days if they think it will be in the public interest. Sales must not take place before sunrise nor later than ten o'clock except in the case of a public dinner or ball. The licence cannot be granted for a Sunday, Good Friday, Christmas Day nor any fast or thanksgiving day. At least twenty-four hours' notice of the application must be given to the police, and it is also usual to give the same notice to the clerk to the Licensing Justices.

The second kind of "Occasional Licence" is where the licensee wishes to have his hours of sale at his own premises extended. This is permitted by s. 57 of the Licensing Act, 1910. There must be some special occasion for which the exemption is

required—such as, a local festival or entertainment. The application must be made to the Commissioner of City Police in the City of London, the Commissioner of Police for the Metropolis in the Metropolitan Police District and elsewhere to a petty sessional court.

### ALTERATIONS

No alterations to ON-licensed premises which give increased facilities for drinking, or conceal from observation any part of the premises used for drinking, or which affect the communication between the parts of the premises used for drinking, or which affect the communication between the part of the premises where liquor is sold and any other part of the premises, or any street or other public way, must be made without the consent of the licensing justices at the General Annual Meeting or a special session. The justices may before consenting, require plans of proposed alterations to be previously deposited with their clerk.

The justices may also on renewing an ON-licence, make it a condition of renewal that proper structural alterations shall be carried out; and with this in view may require a plan to be previously produced before them and deposited with their clerk. If the alterations are carried out, no further requisitions can be made within the next five years from the date of the order.

#### (4) JUSTICES REFUSING TO RENEW

By s. 16 of the Licensing Act, 1910, the justices may refuse to renew a licence or grant a transfer

in all cases (except beerhouses licensed before 1869) on the following grounds—

(1) That the licensed premises have been ill-conducted.

(2) That they are structurally deficient or structurally unsuitable.

(3) That the proposed holder of the licence is not a fit or suitable person.

(4) That the licence if renewed would be void (as for example, a licence granted to a disqualified person).

Persons who are not qualified to hold a licence are described in s. 35 of the Licensing Act, 1910. They are—

(1) Any sheriff's officer or officer executing the legal process of any court of justice in England or Wales;

(2) Any person convicted of felony, the disqualification to continue during the lifetime of that person;

(3) Any person convicted of forging a justices' licence or making use of a forged justices' licence knowing it to have been forged, the disqualification to continue during the lifetime of that person;

(4) Any holder of a justices' licence convicted whether under this Act or otherwise, of permitting his premises to be a brothel, the disqualification to continue during the lifetime of that person;

(5) Any person ordered to be disqualified under the provision for the purpose contained in this Act on conviction for selling intoxicating liquor without a justices' licence, the disqualification to continue for the time mentioned in the order; and

(6) Any person who by virtue of any other Act is disqualified for holding a justices' licence.

### COMPENSATION

When an ON-licence is not renewed on the grounds that it is a redundant licence and not required, compensation becomes payable to the licensee, and his landlords (if any) for the removal of the licence. The compensation money is paid out of a central fund maintained largely by levy on all ON-licence holders. The scale of levy is set out in Schedule 3 of the Licensing Act, 1910. A yearly tenant may claim refund of his compensation levy from his landlord. The amount that a tenant may claim from his landlord varies according to the unexpired term of his lease (Schedule 3, Part 2). The amount repaid by the landlord can in no case exceed half the yearly rent.

### APPEALS

An appeal against a conviction of a court of summary jurisdiction may be made in the ordinary way (see page 55).

In two classes of cases an appeal may be made to Quarter Sessions against the decision of licensing justices.

(1) Against the refusal of the licensing justices to grant a renewal, transfer or special removal of a licence where the power of refusal is vested in them and not in the compensation authority.

(2) Against an order of the justices to make an order requiring structural alterations to be made in licensed premises.

There is no appeal against a refusal to grant a

new licence; nor against a decision to refer an old ON-licence to the compensation authority; nor against a decision of the compensation authority to suppress a licence with compensation.

Both the tenant and the owner may exercise these rights of appeal. Notice of appeal must be given within five days of the decision to be appealed against to the clerk of the licensing justices and at least 14 days before Quarter Sessions. Within the same five days the appellant must enter into a recognizance with two sureties to prosecute the appeal and pay any costs awarded. Owner and tenant if both appealing may give joint notice. The appeal is then "entered" with the clerk of the peace.

The appeal is a rehearing of the case and parties are not restricted to the witnesses they called at the first hearing.

Procedure to be followed on appeal is set out in s. 29 of the Licensing Act, 1910.





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# PARTNERSHIP PRACTICE

BY

F. W. BROADGATE

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<i>First Edition</i>	.	.	1935
<i>Reprinted</i>	.	.	1936
„	.	.	1938

## PREFACE

IN this section I have endeavoured to give a brief account of the chief matters that will trouble the practitioner in relation to partnership practice. I have not attempted to give a detailed account of the law. For a form of articles of partnership, reference should be made to Volume VII, "Forms."

F. W. B.



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# PARTNERSHIP PRACTICE

## CHAPTER I

### INTRODUCTION

ALTHOUGH in large businesses where a number of persons are interested, a partnership seems to be fast becoming out of favour in preference to the small limited liability company, there nevertheless are many classes of business, e.g. solicitors, stockbrokers, or auctioneers, where the rights of the persons conducting the business, i.e. the partners, are controlled and governed by what are usually termed "Articles of Partnership."

What is a partnership? S. 1 (1) of the Partnership Act, 1890, defines a partnership as "the relation which subsists between persons carrying on a business in common with a view to profit," and under s. 45 "business" includes every trade, occupation or profession. The relation between the members of any company or association which is registered under the Companies Act, or formed or incorporated by or in pursuance of any other Act of Parliament, or letters patent, or Royal Charter, or a company engaged in working mines within and subject to the jurisdiction of the Stannaries, is not a partnership within the meaning of the Partnership Act (s. 1 (2) ).

S. 2 of the Act contains very important rules



for determining whether a partnership does or does not exist, and this Section is here given in full—

2. RULES FOR DETERMINING EXISTENCE OF  
PARTNERSHIP

In determining whether a partnership does or does not exist, regard shall be had to the following rules—

- (1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.
- (2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.
- (3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—
  - (a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:
  - (b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:
  - (c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:
  - (d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto:

- (e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

It is not proposed here to enter into any detailed analysis or discussion of the provisions of this important Section and it must be particularly noted that the sharing of profits though *prima facie* evidence, is not conclusive. As an example, many employees receive a salary proportionate upon the profits of the business. They have no capital invested and take no part in the management of the business. They are not therefore partners.

Persons who have entered into partnership with one another are collectively called a firm, and the name under which their business is carried on is called the firm-name (Partnership Act, 1890, s. 4 (1)).

Who may or who may not be partners? Generally speaking, all persons over twenty-one years of age (except convicts) of sound mind, are capable of becoming members of a partnership. An infant may become a partner and the position of the infant partner in the event of the bankruptcy of the partnership is considered in Volume I. An infant partner is not however to be recommended. He incurs no responsibilities and may on attaining his majority, repudiate past transactions. If on attaining his majority, an infant partner wishes to retire from the firm, he should give notice immediately to his co-partners as otherwise he will be liable for any debts incurred by his co-partners subsequent to his attaining twenty-one. Naturally

a lunatic cannot become a partner. An existing partnership does not become dissolved by reason of one of the partners becoming lunatic. He is still entitled to his share of any profits and liable for any losses. In the event of a member of a partnership becoming lunatic the proper course is for an application to be made for a receiver to be appointed under s. 116 of the Lunacy Act, 1890. The directions of the master can then be obtained as to whether the partnership is to be dissolved or continued.

A partnership may be either general or limited. The limited partnership is in these days very rare, and in connection with this class of partnership the provisions of the Limited Partnership Act, 1907, must be carefully considered.

## CHAPTER II

### PARTNERSHIP ARTICLES

THE actual preparation of the Articles of Partnership is a matter of conveyancing practice. The document is prepared in draft in the usual way, approved by all the intended partners, and usually engrossed in so many parts as there are partners. For example, supposing there are four partners. The document is then engrossed in four parts, one being stamped as the original and the other three as duplicates. All the documents must of course be executed by ALL the parties. It does not matter which partner holds the original document. The original document must be stamped 10s. and each duplicate 5s. Where, however, only one document is executed, the usual practice is to deposit it at the firm's bankers, to be held to the order of *all* the partners.

The terms of a common Partnership Deed are usually—

(a) The agreement between the partners to enter into the partnership and to carry on a specified trade, business or profession.

(b) The amount of capital to be contributed by each partner.

(c) The duties of each partner, e.g. whether any or all of them are to devote their whole time to the business.

(d) The drawings each partner is to be allowed

to make (and whether weekly or monthly) on account of profits.

(e) The method of signing cheques, e.g. whether they are to be signed by say one or all of the partners.

(f) The bankers of the partnership.

(g) Who is to have the right to dismiss or employ employees.

(h) How the partnership is to be wound up or dissolved and how the assets are to be distributed.

(i) General terms as to the conduct of the business.

The above terms are of course only a bare outline and admit of much elaboration. It has also to be remembered that even where Articles of Partnership have been entered into, there are certain statutory provisions governing matters not dealt with in the Articles.

The Articles may provide for the partnership being for a fixed term, or limited to a single adventure. What therefore is the position when no fixed term has been agreed upon? The partnership is then a partnership at will and any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners (Partnership Act, 1890, s. 26), and where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, i.e. the partnership remains a partnership at will determinable in accordance with s. 26. Again, if a partnership is formed for the sole purpose of carrying out a

single enterprise, it will be deemed to subsist until that enterprise has been completed (Partnership Act, 1890, s. 32 (b) ).

Notice to any partner who habitually acts in the partnership business of any matter relating to the partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner (Partnership Act, 1890, s. 16). The blunt meaning of this Section is that when it is necessary to prove service of notice on a firm, it is sufficient to prove that the notice was given to any one of the partners who habitually acts in the partnership business. Thus, service of a Writ on a partner (accompanied by a notice that the Writ is served on him as a partner in the firm) is good service of the Writ on the firm (see also Rules of the Supreme Court, Order 48A, and County Court Rules, Order 7). The notice may be endorsed on the writ or given by a separate document and need not be addressed to any one by name. Where the partnership has, to the knowledge of the person sueing, been dissolved, service of the Writ must, however, be made on every person within the jurisdiction, whom it is sought to make liable.

Subject to any agreement (express or implied) between the partners, the interests of the partners in the partnership property and their rights and duties in relation to the partnership are determined by rules contained in s. 24. These Rules are as follows—

- (1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

- (2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—
  - (a) In the ordinary and proper conduct of the business of the firm; or,
  - (b) In or about anything necessarily done for the preservation of the business or property of the firm.
- (3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent per annum from the date of the payment or advance.
- (4) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.
- (5) Every partner may take part in the management of the partnership business.
- (6) No partner shall be entitled to remuneration for acting in the partnership business.
- (7) No person may be introduced as a partner without the consent of all existing partners.
- (8) Any difference as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.
- (9) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

Naturally, however, many if not all of the above provisions will be incorporated in the Articles but the provisions of this Section should always be borne in mind.

As between the partners themselves, perhaps the most important *implied* condition is that the partners shall be faithful to each other and to the firm, but it will be appreciated that the task of disproving the good faith of a partner is usually one of great difficulty. Following this principle of good faith, the natural sequence is that a partner cannot make or gain any personal advantage at the expense of the partnership. These

matters are governed by ss. 29 and 30, which are as follows—

29. (1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connexion.  
(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.
30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner (s. 5).

When dealing with partnership business, the distinction between the *capital* and property of a partnership should be remembered. Shortly, the *capital* is the amount which the partners contribute for the purpose of carrying on the business, i.e. the amount of their investment. The capital remains fixed and is only increased or reduced by agreement between all the parties. The Articles usually provide that each partner shall receive interest on the amount of his capital at a stated



rate before the profits are ascertained and in a dissolution the capital is repaid before the assets are distributed. The property of a partnership is its assets and varies from day to day. Naturally questions often arise as to whether any particular asset is partnership property or the separate property of any one of the partners. All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm or for the purposes and in the course of the partnership business, are partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement (s. 20 (1) ). Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm (s. 21).

Where the term of a partnership deed has expired and the partners desire to continue in partnership for a further term on the same terms as originally, there is no need for fresh Articles to be entered into, but a short memorandum under hand endorsed on the original Articles and signed by all the partners is sufficient. Such a memorandum under hand would only require a sixpenny stamp. Where, however, the terms are materially altered completely fresh Articles are advisable.

## CHAPTER III

### REGISTRATION OF BUSINESS NAMES

A POINT not infrequently overlooked in connection with partnership practice is the necessity in certain cases of registration under the Registration of Business Names Act, 1916. Under this Act any person or partnership firm trading in an assumed or fictitious name, or under names which have been changed or otherwise than in their own true surname without any addition other than the true Christian names or initials thereof, must be registered as provided by the Act. Where a partnership firm includes a corporation as a partner, and the corporate name of that partner is not fully disclosed in the partnership trading name, registration must be effected.

The particulars required to be registered are—

1. The business name.
2. The general nature and principal place of business.
3. The present and former Christian names and surnames of (a) the proprietor of the business, or (b) each partner and his usual residence.
4. The nationality, and if that nationality is not the nationality of origin, the nationality of origin of the trader or each partner, as the case may be.
5. The corporate name and registered or principal office of the corporate partners.
6. The date of commencement of the partnership.

The Act has as its object the enforcement of publication of the facts connected with the

business and accordingly the partners' true names (and former names, if any) their nationality if not British and if the present nationality is not the nationality of origin, the nationality of origin and the corporate names of all corporate partners must be stated in legible characters on all trade catalogues, circulars, show cards, business letters, and other documents on which the business name appears.

The necessary forms of application for registration can be obtained from the Registrar of Business Names, Somerset House, Strand, London, W.C., or most law stationers. The registration fee is 5s. On registration a certificate is issued by the Registrar and this must be exhibited at the principal place of business. The register is open to inspection on payment of a fee of 1s. and copies or extracts therefrom may also be obtained.

The Act provides for a penalty of £5 a day in the event of default in registration, but it seems that this penalty is rarely enforced. Apart from this penal provision, where default is made in registration, the rights of the defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars are required to be registered at any time while he is in default are not enforceable by action or other legal proceeding either in the business name or otherwise (Registration of Business Names Act, 1916, s. 8), but the High Court may grant relief on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds

it is just and equitable to grant relief, either generally or as respects any particular contracts, but may impose terms. Relief may be granted at any stage of the action or after judgment (*In re Shaen, Ex p. Silverman*, [1927] 1 Ch. 355; 96 L.J. Ch. 282). Where proceedings are commenced in a County Court, the county court judge may grant relief on any grounds that are just and equitable (see *Weller v. Denton*, [1921] 3 K.B. 103; 90 L.J.K.B. 889).

## CHAPTER IV

### WINDING-UP

A PARTNERSHIP is dissolved—

(a) If entered into for a fixed term, by the expiration of that term.

(b) If entered into for a single enterprise, by the completion of that enterprise.

(c) If no time is defined, by notice.

The first two cases seem to need no further comment and as regards the third contingency, it is important to note that the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice (s. 32; a form of notice will be found in Volume VII).

Subject to any agreement between the partners, a partnership is dissolved as regards all the partners by the death or bankruptcy of any partner (s. 33 (1) ), or, at the option of the other partners, may be dissolved if any partner suffers his share of the partnership property to be charged for his separate debt (s. 33 (2) ), and in every case is dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership (s. 34).

On application by a partner the Court may decree a dissolution in any of the following cases—

(a) Whenever a partner is found lunatic by inquisition, or is shown to the satisfaction of the

Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner.

(b) When a partner, other than a partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract.

(c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business.

(d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him.

(e) When the business of the partnership can only be carried on at a loss.

(f) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved (s. 35).

In the High Court all causes or matters for the dissolution of partnerships or the taking of partnership or other accounts are taken in the Chancery Division. The County Court has jurisdiction for the dissolution or winding-up of any partnership in which the whole property, stock, and credits of the partnership do not exceed £500 in amount or value.

When dissolution is by notice, the notice should be in writing and communicated to all the partners, and where the partnership has originally been constituted by deed the notice must in fact be in writing (s. 26 (2) ). On the death of a partner, the date of dissolution is the date of death.

On dissolution, accounts of the partnership affairs are essential and in large businesses these are usually entrusted to accountants. The next step is then to collect outstanding debts and settle the debts due. The accounts between the partners themselves are then settled and if there is then any surplus it is divided between the partners according to their shares. If, however, there should be a deficiency this must be contributed by the partners—again on the basis of their shares.

When dealing with dissolution generally, it may be well to state exactly what is a share in a partnership. Briefly the share of a partner may be stated to be his proportion of the assets, after realisation and payment of all the debts and liabilities of the firm, and in this connection the fact that, in the absence of an agreement to the contrary, the partners are deemed to share equally, should be borne in mind.

On a dissolution every partner is entitled to have the property of the partnership applied in payment of the debts and liabilities of the firm (s. 39), and a creditor obtaining a judgment against any partner cannot levy execution on the partnership property. He may, however, obtain a charging order on such partner's interest in the partnership assets and profits and the

appointment of a receiver of such partner's share of profits, whether accrued or accruing, and of any other money which may be coming to him in respect of the partnership (s. 23 (2)). This procedure is of fairly common occurrence. Where a charging order is obtained, the other partner or partners may redeem the interest charged. The person obtaining a charging order is entitled to obtain an order for the sale of his judgment debtor's interest in the partnership property, and where a sale is ordered, the other partners or partner are entitled to purchase. Their purchase, however, must be at the true value of such share.

On a dissolution by consent or notice, it is usual to give notice of the dissolution by advertisement in the *London Gazette*. This notice is sufficient notice to persons who have *not* had dealings with the firm before the date of dissolution (s. 36) and it is imperative to notify the dissolution to persons who *have* had dealings, so as to ensure the outgoing partner's immunity from liability.

If a partnership is rescinded on the ground of the fraud or misrepresentation of one of the parties, the party entitled to rescind is, without prejudice to any other right, entitled—

(a) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is

(b) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and



(c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm (s. 41).

The partners may of course at any time agree between themselves terms of dissolution.

## CHAPTER V

### DEATH OR ADMISSION OF A PARTNER

As before stated the death of a partner (unless otherwise provided) automatically puts an end to the partnership, but the deceased's estate nevertheless still remains liable to creditors of the firm in respect of debts contracted during his lifetime. The executors do not become partners in the firm, and their duty is to see that the partnership is promptly wound up.

The usual procedure on the death of a partner is to offer the deceased's share to the other partner or partners. Accounts must naturally be taken as at the date of death and the value of the deceased partner's share is then usually ascertained by valuation, and this amount together with the deceased partner's share of capital (and interest) and the share of profits up to the date of death paid over. The amount of capital and share of profits may of course be included in the purchase price.

Any necessary notices of change must be given under the Registration of Business Names Act, and if the partnership is dissolved, notice inserted in the *London Gazette* and notice of cessation of business given to the Registrar of Business Names.

Naturally many questions may arise, particularly on the accounts, between the executors of a deceased partner and the surviving partner or partners, but a discussion of these problems is beyond the province of this Volume.

The partners may of course provide in the Articles as to the admission of a new partner or partners, but if the Articles contain no such provisions, no person may be introduced as a partner without the consent of all the existing partners (s. 24 (7) ).

Following the question as to the admission of a new partner, a question which naturally arises is as to whether a partner may sell his share. We have already seen that even the executors of a deceased partner are not entitled to become partners except by the consent of the surviving partner or partners. A partner may, however, sell his share, but his assignee does not become a partner. The rights of the assignee are governed by s. 31, which is as follows—

31. (1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.
- (2) In case of a dissolution of a partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

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# PROBATE PRACTICE

BY

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<i>First Edition</i>	.	.	1935
<i>Reprinted</i>	.	.	1936
„	.	.	1938

## PREFACE

WHAT is commonly known as probate business forms a large part of the work conducted in almost every solicitor's office and may be divided into two classes, viz. contentious and non-contentious business. Only the latter class of business is considered in this section.

Many estates are left by testators "in trust" and the whole subject of trusts and their administration will be found dealt with in Volume X. A full discussion of the innumerable matters involved in the procedure is unfortunately far beyond the scope of this Volume, but as many matters as possible are dealt with in the limited space which is available.

What may be conveniently termed "the law and incidence of estate duties" is dealt with in Volume VI.

N. C. W. E.





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# PROBATE PRACTICE

## CHAPTER I

### INTRODUCTION

IMMEDIATELY a person dies, no dealing with any part of his estate is possible, as, until authorised by either a grant of probate or administration, there is no person capable of giving a valid receipt. When therefore the deceased has left a will the executors named therein (unless any of them wish to renounce) should forthwith proceed to prove such will, or, if the deceased has died intestate, the person or persons entitled should apply for a grant of administration.

The first step necessary to enable a grant to be obtained is the natural one of ascertaining whether the deceased has in fact left a will or not, and if he has left a will, whom he has appointed his executors and whether they are willing to act. If he has made a will a full copy should be made for working purposes and the original deposited in a place of safe custody. If he has left no will, it will be necessary to ascertain who are the persons entitled to apply for a grant of administration. The next step is to obtain full particulars of the deceased's estate, debts, etc. The ascertaining of the assets is in some cases a matter of great difficulty and may involve references to banks, stockbrokers, income tax returns and other sources from which information may be obtained.

As the assets and liabilities are ascertained the subsequent procedure of preparing the inland revenue affidavit will be considerably simplified if they are marshalled on a form of instructions, divided into sections corresponding with the various headings in Form A6.\* This course will prevent any asset or liability being omitted from the inland revenue affidavit and avoid delay in the winding-up of the estate. The omission of an asset or liability may involve the passing of a corrective affidavit. The clerk should understand at once that probate practice generally presents many difficulties and problems, particularly in the preparation of the oath, from which document the grant is actually prepared, and in these cases it is advisable to have the papers settled in the registry before they are sworn and lodged for probate. This course will obviate the papers being returned for amendment and possible re-swearing. A small fee is usually charged in the registry for settling papers.

Representation may be obtained of a deceased's real and personal estate, or of either, separately, and if there is any trust estate, a separate representation may be obtained in respect of the trust estate. A full grant "save and except settled land" may also be obtained.

The wills of all persons who die in England may be proved at the Principal Probate Registry (Somerset House) or in any of the District Registries. Thus, if a testator died in Manchester application may be made either to the Principal

\* The various Forms and the occasions on which they have to be used will be found in Volume VI.

Registry or to the District Registry at Manchester, whichever is the more convenient. The former territorial limits governing applications to the District Registries have been abolished. Letters of administration are similarly granted out of either the Principal or the District Registries. Application for a grant should not however be made until seven days from the date of death have elapsed. On the other hand, if application is made more than three years after the date of death, a satisfactory explanation of the delay will have to be given. This is usually given by a certificate of the extracting solicitor.

If application is made to take a separate grant of the real estate, or any part thereof, or of the personal estate (not being trust estate) the oath must state that the deceased died solvent.

## CHAPTER II

### OATHS OF EXECUTORS AND ADMINISTRATORS AFFIDAVITS OF ATTESTING WITNESSES, ETC.

#### OATH FOR EXECUTORS

IN filling up the papers, the following general practical points should be noted.

The description of the testator should follow that contained in the testamentary disposition. If there is a difference between the name in the body of the will and the name as signed, the testator should, if the former name is correct be described by the name he signs *otherwise* the name given in the body of the will. If the place of residence at the date of death differs from that stated in the will, the latter residence should be inserted after the words "formerly of," e.g. A.B. of Blank Mansions, Blankacre (*place of death*) formerly of 10 Crescent Place, Whiteside (*place of residence stated in the will*). Not more than three places of residence should be given and the last residence should appear first in the oath. Too much care cannot be taken in the preparation of the oath. As before stated the oath is the document from which the actual grant is prepared in the Registry and if any error is made there is a distinct possibility of it being perpetuated, which is annoying to everybody concerned. If an error is made it can usually only be corrected by order of the Registrar.

A testator described in a will as "the elder"

but who does not so sign himself need not have the words added, but if described as "the younger" he should be so described, or as "heretofore the younger," as the case may be.

A sole executor, or sole executrix, should be so described. If there are more than one, they should be described, if females, as the "executrices," if males, or partly males and partly females, as "executors." The expressions "joint executors" or "executor and executrix" are not used.

If an executor is wrongly described in the will or described by a wrong Christian name, an affidavit of identity will be required. The executor's proper place of residence must be stated. Any relationship which existed between the testator and the executor should be described in the oath as father, mother, grandfather, grandmother, son, daughter, grandson, granddaughter, brother, sister, uncle, great-uncle, great-aunt, nephew, niece, great-nephew or great-niece.

### AFFIDAVIT OF EXECUTION

If there is no, or a defective, attestation clause, or if there are any alterations in the will which were not initialled at the time of execution, an affidavit of due execution will be required of one of the attesting witnesses. Such an affidavit must also depose to the due execution of the will. If both of the attesting witnesses are dead or not available, the affidavit must so state, and may in such case be accepted from any person who was present when the will was signed or who can identify the handwriting of the Testator and the subscribing witnesses.



An affidavit of plight and condition is required if the will bears any indication that any other document has at any time been attached to it. The usual indications are caused by pin-holes. The affidavit must in this case state that the will produced was in the same state when found after the testator's death.

The following specimen forms of affidavit are given by way of further explanation.

IN THE HIGH COURT OF JUSTICE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

(PROBATE.)

## THE PRINCIPAL REGISTRY

or

THE DISTRICT REGISTRY AT

X Y, deceased.

I, A B of \_\_\_\_\_ in the County of \_\_\_\_\_

(description) make Oath and say as follows—

1. I am one of the subscribing witnesses to the last will and testament of the said X Y of \_\_\_\_\_ in the County of \_\_\_\_\_ deceased, the said will being now hereunto annexed bearing date the \_\_\_\_\_ day of \_\_\_\_\_ 19.., and that the said Testator executed the said will on the day of the date thereof by signing his name at the foot or end thereof as the same now appears thereon in the presence of me and of C D the other subscribed witness thereto both of us being present at the same time and we thereupon attested the same in the presence of the said testator.

2. I further make oath and say that the alterations in the \_\_\_\_\_ line(s) of the said will were made before the execution of the said will as the same now appear.

Sworn, etc.

## AFFIDAVIT OF PLIGHT AND CONDITION

*(Heading—as above)*

I, A B of *etc.*, make Oath and say—

1. I am one of the executors named in the paper writing now hereunto annexed purporting to be and contain the last will and testament of X Y of *etc.* who died on the

day of 19.. at

the said will bearing date the

day of 19.. and having particularly observed (*here describe the plight and condition and, if possible, trace the will from the possession of the testator to the time of making the affidavit*).

2. The said will is now in the same plight, state and condition as when found by me.
3. And I further make Oath and say that no codicil or testamentary paper was annexed to the said will.

Sworn, *etc.*

## PAPERS REQUIRED

The papers required to lead to a grant of probate are (a) the original will and codicil (if any); (b) oath of executors; (c) affidavit for inland revenue; and (d) warrant (Form 17), and for a grant of administration (i) oath of administrators, (ii) affidavit for inland revenue, (iii) administration bond, and (iv) warrant. In addition, to facilitate the examination of the papers in the Registry, the authorities require certain information to be given on a Form of Observations (Form No. 36). This form requires particulars of (*inter alia*) any settlements made by the deceased, life interests, gifts *inter vivos*, etc. The furnishing of this information does not in a normal case present any difficulty.

Form No. 36 is as follows—

.....deceased,  
 who died on the ..... day of ..... 19....

It will facilitate the examination of the Inland Revenue Affidavit of the deceased's estate, if this Form, with answers to the several observations, is lodged with the Affidavit on applying for the grant of representation to the deceased.

OBSERVATIONS	ANSWERS
<b>1. Settlements.</b>	
<p>Was any settlement executed by the deceased on marriage or otherwise?</p>	
<p>If so, please forward it, or the draft, or a copy of it (which will be returned), to the Controller, Estate Duty Office, Inland Revenue, Somerset House, London, W.C.2, for notation.</p>	
<b>2. Life Interests.</b>	
<p>Was the deceased in receipt of an annuity or interested for life or otherwise in any property, British or Foreign, other than that at 1, and other than that of which particulars are given in the Inland Revenue Affidavit of the deceased's estate?</p>	
<p>If so, and the annuity or interest was derived under a will, the full name and date of death of the testator and the date and place of probate of such will should be stated, and if under a deed, the original, or a draft, or copy (which will be returned), should be forwarded to the Controller, Estate Duty Office, Inland Revenue, Somerset House, London, W.C.2, for perusal.</p>	
<b>3. Gifts Inter Vivos.</b>	
<p>(a) Did the deceased make any gift or gifts of money or other property within three years of his death?</p>	
<p>(b) Did the deceased, at any time, make any gifts in which he reserved a life or other interest?</p>	
<p>If so, please furnish full particulars of all such gifts.</p>	

OBSERVATIONS	ANSWERS
<p><b>4. Policies of Insurance (including Nomination Policies).</b></p> <p>(a) Did any moneys (other than those [if any] included in the Inland Revenue Affidavit) become payable on the death of the deceased under any policy of Insurance, whether <i>fully paid up</i> or not?</p> <p>If so, be good enough to furnish full particulars, stating by whom the policy was effected and the premiums paid and the names and addresses of the persons beneficially entitled.</p> <p>(b) Did the deceased effect any policy of Insurance (in force at the date of his death) of the following description, viz.: Children's Deferred Insurances, Children's Educational Insurances or similar Insurances?</p> <p>If so, full particulars should be given.</p> <p>(c) Did any moneys become payable on the death of the deceased under any newspaper insurance scheme?</p> <p>If so, full particulars should be given.</p> <p><b>5. Annuities.</b></p> <p>Does any annuity or sum of money otherwise than under the deceased's will become payable on his death to any person?</p> <p>If so, please furnish particulars.</p> <p><b>6. Property held Jointly (whether included in the Inland Revenue Affidavit or not).</b></p> <p>Was the deceased joint owner of any property, real or personal, other than property of which he was merely a trustee, or was the deceased interested beneficially in any moneys or securities in the joint names of himself and another?</p>	

OBSERVATIONS	ANSWERS
<p>If so, please give particulars, and—</p> <p>(1) If the property was acquired under a will, state the full name and date of death of the Testator and the date and place of probate of such will.</p> <p>(2) If the property was acquired by purchase, state—</p> <p>(a) The date of purchase.</p> <p>(b) By whom and in what shares the purchase money was provided; and if any part was provided by the deceased's wife, the exact source of her separate estate, and the date of the marriage.</p> <p>(3) If there is money on joint deposit or joint current account at a bank, state the date of the opening of the account and similar particulars as in (2) (b) above.</p> <p>(4) State the names and addresses of the surviving beneficiaries and of their Solicitors.</p>	
<p>NOTE.—The questions under this heading only refer to property which passed on the deceased's death to the SURVIVOR in joint ownership as such and not to any share of property which belonged absolutely to the deceased and passed under his Will or Intestacy. Such a share should be included in the Inland Revenue Affidavit as part of the deceased's estate.</p>	
<p><b>7. Furniture.</b></p> <p>(a) Has the deceased's furniture, etc., or any portion thereof been sold?</p> <p>If so, please state particulars, including the date of sale and the gross amount realised.</p> <p>(b) If not yet sold, is a sale either of the whole or part contemplated at an early date?</p> <p>The result of any sale should be communicated to this Office.</p>	
	<p>(Signature).....</p> <p>(Date) .....193....</p>

Until quite recently, it was necessary on applying for a grant of probate also to lodge what was termed a "probate engrossment" of the will (and codicils). Except when the original will is written on brief paper, probate engrossments are not now required when application is made to the Principal Registry. Instead a photostatic copy of the will and codicils (if any) is made in the Registry and this copy is attached to the grant. Where the will is written on brief paper the probate engrossment is photographed. No doubt this practice will in the near future be extended to the District Registries.

A still more recent innovation is that photostatic copies of a *grant* are obtainable at a cost of one shilling each. As many copies as may be required are obtainable, and these copies must be accepted for registration purposes, and, as will be seen later, the use of these copies considerably facilitates the winding-up of an estate. Where application is made to a District Registry, and photostatic copies of the grant are required, the grant is sent from the District to the Principal Registry for photographing purposes. Application for these copies should be made at the time the papers are lodged for the grant when no search fee will be payable, and the copies are available in a few days' time. This of course means a few days' delay before the grant is issued, but it is submitted that this delay is more than compensated for by the time saved in effecting registrations. By means of these copies, all necessary registrations can be effected without the necessity of the original grant leaving the office. This is a matter

of importance especially when the real estate is in course of sale and the original grant is required for production.

### OATH FOR ADMINISTRATORS AND ADMINISTRATION BOND

The order in which Grants (or Letters) of Administration are granted is as follows—

1. Husband or wife.
2. Children or their issue.
3. Father or mother.
4. Brothers and sisters of the whole blood or their issue.
5. Brothers and sisters of the half blood or their issue.
6. Grandparents.
7. Uncles and aunts of the whole blood or their issue.
8. Uncles and aunts of the half blood or their issue.
9. The Crown.
10. Creditors.

The most important point when preparing the oath for administrators is to see that all persons having a prior right to the grant are “cleared off” and the oath must be so worded as to show that the person applying for the grant is the only, or one of, the next of kin of the deceased. By “clearing off” is meant the statement in the oath that no person having a right prior to that of the applicant exists, or that such person has either renounced or died since the intestate without having obtained a grant of administration. If this clearing off process is not properly done, the oath will not be accepted.

Since the 1st January, 1926, in all cases where there is a minority or life interest, two administrators at least are necessary.

The object of the administration bond is to ensure that the estate is properly administered and must be entered into by the intending administrator with two sureties, unless taken out with a guarantee society. The premium charged by a guarantee society is based on the value of the estate and is properly chargeable against the capital of the estate. One surety only is required where the gross value of the estate is under £50, or the administrator is the husband of the deceased, or the husband's representative or attorney, and the administrator is always the first person named in the bond.

If the deceased died before the 1st January, 1926, the penalty must be double the gross amount of the personal estate, and, in addition, double the gross annual value of the real estate. If the deceased died after that date, the penalty must be double the gross value of both the real and the personal estate. The bond must be executed by the administrator in the presence of and attested by the same commissioner who administers the oath but may be executed by the sureties in the presence of a different commissioner and where the estate exceeds £100, must be stamped 5s.

### ADMINISTRATION WITH WILL ANNEXED

Administration with the will annexed is granted where a person dies leaving a will and there is no



executor appointed, or the appointed executor has died before the testator or without proving the will, or renounced or is incapable (e.g. by reason of lunacy) of acting, or being resident out of the United Kingdom and not desirous of acting has appointed an attorney to act for him, or the executor has died intestate after proving the will and before completing the winding-up of the estate. In the latter case the grant will also be *de bonis non*.

In cases where there is no executor appointed, or the executor has renounced or died without proving the will, the order of priority is—

1. Residuary legatees or devisees in trust (not exceeding four).

2. Residuary legatees or devisees for life (not exceeding four).

3. Ultimate residuary legatees or devisees or where the residuary estate is not wholly disposed of, the persons entitled upon an intestacy.

4. The legal personal representatives of persons in No. 3.

5. Legatees, or devisees, or creditors.

6. Contingent residuary legatees, or devisees, or contingent legatees or devisees or the persons who would be entitled in the case of an absolute intestacy.

7. The Crown.

The renunciation by an executor of probate of the will includes a renunciation of his right to a grant of administration with will annexed if he is entitled to such grant as residuary legatee or devisee or otherwise.

Where the grant is given after the 1st January,

1926, and there is a minority or life interest created, or any beneficiary is a minor, or there is a minority interest in the estate, there must be at least two, but not more than four, administrators. The oath must show whether there is or is not such a life interest or minority and where the death occurred on or after the 1st January, 1926, whether or not there is any land vested in the deceased which was settled previously to his death and not by his will. Where there is any doubt as to who is entitled to the grant, the directions of the Probate Registrar should be obtained. An administration bond is required in all cases.

Rule 37 of the Probate Rules (see page 90) provides that the oath must be so worded as to clear off all persons having a prior right to the grant and the grant has to show how such prior interests have been cleared off. The preparation of the oath is in some cases rather a difficult matter and examples in representative cases are given in the recognized treatises on probate practice.

The administrator must be sworn to the oath and execute the bond before the commissioner before whom the oath is taken.

Seven clear days must elapse from the death of the testator before the grant can be made and a certificate of delay is required when application is not made until three years after the date of death.

### ADMINISTRATION DE BONIS NON

Where a grant of probate has been made and the executor, or last surviving executor, has since

died leaving any part of the estate unadministered, the court will make a grant of administration with the will annexed of the unadministered estate. Another case where the grant is required is where the sole or surviving executor dies without appointing an executor of his will, or where, having appointed an executor, such executor has renounced or died without proving the will. The person entitled is the person who would have been entitled to the original grant if the deceased had not appointed an executor, or if the executor had renounced or died without proving the will.

The grant may be taken out of the Principal Registry even though the first grant was out of a District Registry and the administrator may either attend at the Registry to be sworn upon the original will or may be sworn upon the first grant or a sealed copy of the will and an office copy of the original grant must be lodged with the papers. The papers required are the oath, inland revenue affidavit (Form A5) and the bond.

## DESCRIPTION OF ADMINISTRATOR

In completing the oath for administrator, the description of the administrator must be—

<i>Husband or</i>	The lawful husband
<i>Wife.</i>	widow and relict.
<i>Issue of</i>	The lawful son and only
<i>Marriage.</i>	daughter one of the
	grandson
	granddaughter
	person(s) entitled to (share in) the estate.
<i>Parents.</i>	The lawful father and only
	mother one of the
	person(s) entitled to (share in) the estate.

<i>Brother or Sister.</i>	The lawful brother of the whole blood sister half and only person(s) entitled to (share in) one of the the estate.
<i>Issue of Brother or Sister.</i>	The lawful nephew (or great nephew) of the whole niece (or great niece) half only blood and one of the person(s) entitled to (share in) the estate.
<i>Grandparent.</i>	The lawful grandfather and only grandmother one of the person(s) entitled to (share in) the estate.
<i>Uncle or Aunt.</i>	The lawful uncle of the whole blood and aunt half only person(s) entitled to (share in) the one of the estate.
<i>Issue of an Uncle or Aunt.</i>	The lawful cousin german of the whole blood half and only person(s) entitled to (share in) the one of the estate.

## LIMITED GRANTS

There are still many forms of limited or *cessate* grants. The form of the oath in these cases varies according to the circumstances, and precedents in many cases are to be found in the treatises on probate practice, to which the reader is referred.

## CHAPTER III

### INLAND REVENUE AFFIDAVIT

THE oath being prepared, the next step is the preparation of the affidavit for inland revenue, which is the document containing particulars of the deceased's estate.

The most common form in use is No. A6 (A7 is rather more formidable) and is divided into sections. The first section is the affidavit itself, which is followed by various accounts and schedules, then follows a summary and a receipt for the duty and interest. Copious notes are printed on the form itself and these should be carefully followed, and the following points are intended to be supplemental to the official notes and instructions.

So far as the affidavit itself is concerned no difficulty should be experienced in preparing it for swearing in an ordinary case if the notes above mentioned are carefully followed, and it is usually possible for a clerk to obtain the drafts used in other cases for his guidance.

It will be observed from a perusal of the affidavit that the accounts and schedules themselves are divided under various sub-headings and the following notes correspond with these sub-headings.

### STOCKS AND SHARES

Particular attention is directed to the method of valuing stocks and shares indicated on Note A and the footnote on page 3 of the affidavit. As the reader will probably be aware, Stock Exchange

Lists are issued daily, immediately after the Stock Exchange has closed, and the prices given are the current prices of the day of issue. The prices given in the daily morning newspapers are naturally those of the previous day. If the prices given are those quoted in a Provincial Stock Exchange List, a copy of such list should be annexed to the affidavit.

There are however many classes of securities for which no official quotations are given, e.g. a share holding in a private company. In these cases a certificate of value (as on the day of death) should either be obtained from the secretary of the company or a valuation obtained from a Stockbroker. This does not in any case mean that the returned value will be accepted by the authorities. If not satisfied they will in all probability call for production of balance sheets of the company and particulars of the prices paid on recent dealings. The original certificate or valuation must be annexed to the affidavit.

### UNPAID PURCHASE MONEY

If the deceased has contracted in his lifetime to sell any part of his real or leasehold property, the purchase money, or any part remaining unpaid at the date of death, must be included under this heading. The property itself should not of course be included, as this would be tantamount to accounting for the same property twice over.

### INTEREST IN PROCEEDS OF SALE

The value of the deceased's interest, under a settlement or will, in any real property, must be

accounted for here, whether the property has actually been sold or not.

### SHARE IN PARTNERSHIP

Real property which forms part of partnership property is considered as personal property and should therefore be accounted for under this heading. On the death of a partner, the preparation of accounts showing the position as at the date of death is almost a natural sequence. The preparation of these accounts will in many cases take quite a considerable time and, if it is desired to obtain the grant as quickly as possible, an estimate should be made of the value of the deceased's share and, if necessary, this value can be corrected later in a corrective affidavit.

### INTERESTS IN EXPECTANCY

All interests in expectancy, whether vested or contingent, should be included here. If the interest is contingent on the death of an annuitant, care must be taken in calculating the age of the annuitant. The age should be that attained by the annuitant on the birthday previous to the date of the death of the deceased.

If the interest is conferred by a deed or settlement, the authorities will probably require to see the original deed, or a copy, for noting purposes. Full particulars of the investments and properties comprised in the fund should be given and the values stated as at the date of the death of the deceased.

## OTHER PERSONAL PROPERTY

An example of property to be included under this heading is the common one of the share of a deceased in the undistributed residuary estate of another deceased person. In this case also, full particulars of the undistributed residue must be given, and if the residuary estate is subject to the payment of any annuities, the values of these annuities, calculated in accordance with the Table to the Succession Duty Act, 1853, should be deducted before the value of the deceased's share is ascertained.

## REAL PROPERTY

A reference to Form A6 will show that there are two portions allocated to real property, viz. the Second Part of Account A and Account B. The Second Part of Account A is itself divided into parts, and Account B is also likewise divided.

Where it is intended to pay the estate duty at the same time as the duty on the personal estate, i.e. on delivery of the affidavit, particulars of the real property must be set out on Form 37A and the totals from that Form carried into Account B. At the same time the figures showing the gross value, i.e. the value before deducting any sums which may be due under a mortgage secured on the property should appear in the Second Part of Account A, and the words printed in small type under the sub-heading in Account A as follows: "and of that part of the property in respect of which the duty is not to be now paid in 'an appropriate account' marked . . ." must be deleted. These words are struck out to indicate



that it is proposed to pay duty on the whole of the real property on delivery of the affidavit. If it is intended to pay duty on only a portion of the real property the words indicated above would stand, and the result then is that instead of full particulars of the property appearing in Account B, such particulars would appear in an Account attached to the inland revenue affidavit.

Payment of duty on real estate may be deferred until the expiration of twelve months after the death, except in cases where the fixed duty is paid, when the duty must be paid on delivery of the affidavit. Where it is desired to pay the duty at the expiration of twelve months after the death, Form CI must be used, see page 34. The duty may also, at the option of the executors, or other accounting person, be paid (with interest) by eight yearly instalments, or sixteen half-yearly instalments, and the first instalment is due twelve months after the death. No interest is payable until the expiration of the twelve months, and the first instalment is then paid without any interest. When the second instalment is due, interest at the rate of 4 per cent per annum, from a year after the date of death until payment of the second instalment, is payable upon the whole of the remaining unpaid duty. On payment of the further instalments, interest is similarly payable on the remaining unpaid duty. The whole of the outstanding duty may be paid at any time.

If the property is sold before payment of duty, the duty must be paid on the completion of the sale, and interest in this event begins to run from the date of sale and the fact that the sale may be

completed before the expiration of twelve months from the death of the deceased is immaterial.

### VALUE OF REAL PROPERTY

Most solicitors, and executors, usually have a shrewd idea of the value of real property in their own particular locality, but it does not necessarily follow that their ideas on the subject coincide with those of the authorities. In every case the authorities, before finally accepting the inland revenue affidavit, refer the question of the value of real property to the local Valuation Officer (District Valuer) for confirmation, or otherwise.

The methods as to dealing with real property vary. In some cases the value is calculated on so many years' purchase of the net annual income of the property. Such annual value is obtained by taking the rental, if the property is let, or, if not let, the gross value for property tax (not the reduced assessment for collection) and making the necessary deductions for repairs, ground rent, insurance, etc. In other cases, particularly where there are numerous properties, the practice is to obtain the valuation of an estate agent or valuer, and if this course is adopted, the original valuation must be attached to the affidavit. If this course has been adopted and differences arise as between the figures of the valuer and those of the Valuation Officer, the valuer employed by the executors can then conveniently be instructed to agree the values with the Valuation Officer. The author has known cases where the views of the District Valuer have been ascertained in the first instance, but it is not believed that this practice is very common.

If the property is licensed, special mention should be made of that fact and particulars of the letting given, and mention should also be made of any timber, sporting rights, or minerals connected with the property, and generally special mention should be made of all facts necessary to enable the correct value to be ascertained.

### AGRICULTURAL PROPERTY

The duty on agricultural property is charged according to the provisions of s. 23 of the Finance Act, 1925, to which reference should be made. Agricultural property should be separately indicated, and when the deceased died on or after the 30th June, 1925, the full market value, showing what part of that sum is the agricultural value, should be stated, and if the market value of the property exceeds the agricultural value the excess must be shown.

### DEBTS ON REAL PROPERTY

The debts and incumbrances on real property are set out in Schedule B (page 5 of the Inland Revenue Affidavit) and the total is then carried into Account B and deducted from the gross value. As to deductible debts and incumbrances generally reference should be made to Clauses 43 to 47 of Form A2 (see page 62).

### SUMMARY

The Summary to the affidavit (page 6) has a dual purpose for determining (a) the rate of estate duty and (b) the amount of duty and interest to be paid on delivery of the affidavit. The completion

of the Summary itself is in a simple case a matter of arithmetic, but reference should be made to Clauses 25 to 28 of Form A2 (see page 56).

In calculating interest, care should be taken to omit the date of the death but to include the date on which the affidavit is delivered.

### PREPARING PAPERS

There are several points which must be borne in mind in preparing the papers for signature before lodging at the Registry for probate. The will itself should be marked. This is done by the executor or executors signing his or their names on it and the Commissioner also marks the will in the same way, the word "executor" (or "executors") being added after the signature of the executor or executors and the words "Commissioner for Oaths" after the signature of the Commissioner. In preparing the affidavit for inland revenue throughout it should be mentioned that should there not be sufficient room on the Form of Affidavit itself for particulars of the estate, e.g. particulars of stocks and shares, these are included by means of Schedules attached to the affidavit. All these Schedules require to be signed by the executor or executors. The oath and affidavit require to be sworn before a Commissioner and the accounts signed in the various appropriate places. The omission of the necessary signatures in any of these places will necessitate the papers being returned. The oath must of course also be sworn to.

The papers so completed and sworn are then, with the warrant, the completion of which is again

usually a matter of arithmetic, lodged at the Registry out of which it is desired to obtain the grant and the court fees paid. A receipt will then be given for the papers. If the papers are lodged in a District Registry, a probate engrossment of the will and codicil (if any) will also be required. The court fees are calculated in accordance with the Fees Order set out on page 113.

On receipt of the papers, the arithmetic (as distinct from the calculations and values) will be checked in the Registry and the duty and interest payable assessed. In the course of a few days the grant itself will be issued after payment of the assessed duty and interest.

The original will (and codicils) are retained in the Registry, and the receipt for the duty and interest is given on the affidavit, but the receipt does not imply that the amount of duty is not subject to rectification.

### OBSERVATIONS ON AFFIDAVIT

As previously stated, it does not necessarily follow that the values stated in the inland revenue affidavit will be accepted by the authorities without question. This is of course only natural. Questions as to values, etc., are raised by the authorities by means of "observations." These observations are somewhat in the form of requisitions on title in a conveyancing matter and are replied to in much the same manner. It is, of course, quite impossible to give any indications as to how or in what manner these observations should be answered, as the observations themselves must of necessity differ in almost every case.

## CHAPTER IV

### REALISATION OF ESTATE

BEFORE dealing with the further accounts which are in many cases necessary before an estate can be distributed among the beneficiaries entitled thereto and though perhaps somewhat out of order, it is proposed in this Chapter to consider the procedure immediately after the grant is obtained. The grant itself is the document of title of the executors or administrators and entitles them and is their authority to deal with the estate.

Assuming the deceased had a banking account, the grant should be registered with the bank concerned. In connection with banks generally it may be mentioned here that they are usually considerate provided the estate is solvent in making advances to executors to enable them to pay the estate duty and interest. On production of the grant the bank will register it in their books and supply a form on which specimen signatures of the executors must be supplied. At the same time the bank should be asked to transfer any moneys which stood to the credit of the deceased at the time of his death to an "executors' account."

If the deceased had an account which was overdrawn at the date of death and against which the bank held security, i.e. the deposit of securities or the title deeds of real property, the bank will usually hand over the certificate or title deeds

against the executors' undertaking to pay the proceeds of sale in reduction of the overdraft.

The grant should similarly be registered with the companies in which the deceased held share holdings. The certificate should be forwarded to the company with the grant and particulars of the addresses of the executors. The addresses of the executors are not stated on the grant. The practice of companies with regard to the certificate itself varies. Some companies amend the certificate by inserting the names of the executors in the place of the deceased in the order in which they appear in the grant, while others issue a new certificate. A registration fee of 2s. 6d. is generally payable. Where it is intended to realise the holding immediately, the company can be requested to retain the certificate pending the sale. As before stated, photostatic copies of a grant are now obtainable for registration purposes. Companies are not concerned with the terms of the will itself and they must accept these photostatic copies for registration purposes, and the only concern of the companies is to see that the duly constituted executors or administrators are registered as proprietors of the shares. In cases of companies also specimen signatures are required and, if the estate is not immediately divisible, i.e. a trust constituted, a request for payment of dividends to a bank may be lodged. The object of the request is of course to obviate the executors being continually bothered with dividend warrants, and the possibility of their paying them, inadvertently of course, into their own banking accounts. In the absence of a

request the dividends will be paid by the company to the first named executor. The request is for the dividends to be paid to the executors' bank and the executors then give a direction to the bank to place the dividends as and when received to the credit of their account.

With regard to moneys due on policies of insurance, the discharge of the executors for such moneys is usually by a receipt (the form of which is generally supplied by the insurance company) endorsed on the policy and signed. On production of the grant and handing over the policy with the signed receipt the moneys due under the policy will be paid over.

If any dividend warrants were received by the deceased and not negotiated by him before his death, or if any such warrants were received by the executors before they obtained the grant, they will have to be returned to the Company for amendment.

Holdings of stock and shares are usually realised through Stockbrokers. In a Private Company it is not uncommon for the rights of transfer to be considerably restricted. For instance, the articles of association of a private company may provide that shares can only be transferred to another shareholder of the company. The price of the shares for transfer purposes may also be stipulated, either at a fixed figure or at a figure to be fixed by the accountants of the company. In this connection it must be borne in mind that although the articles contain these restrictions, the authorities may still require that the value of the shares as disclosed by the company's



accounts themselves be returned for duty purposes. In all cases therefore it is advisable before any attempt is made to dispose of shares in a private company to ascertain, either by reference to the articles themselves, or by enquiry of the company, whether there are any restrictions on the right to transfer.

The deceased's accounts, the funeral expenses, etc., must of course be paid, and if the estate is immediately distributable, the assets realised unless the beneficiaries elect to take their shares in specie.

### NOTICES TO CREDITORS

A point which will naturally cross the mind of the clerk is as to how far the personal representatives may ensure that they have received all claims against the deceased's estate before they proceed to distribution.

To ensure that they receive all claims the executors should insert in the *London Gazette* and also in a local newspaper what is commonly called the statutory notice to creditors. The object of the notice is to give notice to creditors to send in their claims against the deceased on or before the date stated in the notice. If a creditor omits to send in his claim within the time stated and the executors or administrators proceed at the expiration of the time stated to distribute the estate before being informed of the claim, they are not then liable for the amount. Two months' notice from the date of the advertisement is the time limit. A reference to a copy of the *London Gazette* or to *The Times* or *Morning Post* will show the form and nature of the notice itself.

## REAL ESTATE

If the real estate or any part thereof has been specifically devised the executors, if all the duties have been paid, will execute an assent vesting such real property in the persons entitled. As regards assents generally it should be borne in mind that a memorandum of the assent should be endorsed on the grant and an examined abstract of the grant handed over with the assent and title deeds. These two points are not infrequently overlooked. An assent does not require to be stamped.

## CHAPTER V

### CORRECTIVE AFFIDAVIT AND ACCOUNTS

#### CORRECTIVE AFFIDAVIT

It very frequently happens in the course of the winding-up of an estate that additional assets or liabilities are discovered, so that an adjustment of the duty paid on the filing of the inland revenue affidavit is required. In addition, apart from these discoveries, values as returned in the affidavit may require rectification, either as the result of the observations of the Estate Duty Office referred to before, or where an estimate of an asset or liability has been made and the true value or amount of the asset or liability has been subsequently ascertained.

There are two forms whereby alterations may be made. Where too little or too much duty has been paid on the inland revenue affidavit, Form D1 is the appropriate form, and where the error arises in respect of property included in or omitted from an estate duty account (i.e. Form C1 or C2), Form D2 must be used. The two forms themselves are very similar and consist of the affidavit itself and two sections for adjustments in the personal property and the real property, and are filled up in duplicate.

If there is not sufficient room to correct the items on the form itself, schedules should be attached and signed. It is not necessary to re-describe the items needing correction in detail and it is sufficient if they are identified with the

corresponding numbers in the inland revenue affidavit, e.g. "Item No. (X) to Schedule A in inland revenue affidavit."

The affidavit may be transmitted by post to the Estate Duty Office and, except where the application is for the return of duty, may be sent signed but unsworn in the first instance. If required to be sworn it will be returned for that purpose. Where the application is for the return of duty, the affidavit must be sworn unless the oath is dispensed with by the commissioners.

The affidavit should be accompanied by the grant and if the commissioners are not satisfied with the affidavit, they will return it for correction or explanation. If satisfied, they will return one copy with a memorandum showing the additional duty payable or the duty returnable.

In the case of too little duty having been paid on a grant of administration, a certificate from the proper officer that the administrator has given further security for the due administration of the estate must be lodged. This entails the administrator entering into a new bond for twice the amount of the additional estate, and an affidavit by the administrator. These two documents must be sent to the Registry out of which the grant was issued when the Registrar will issue a certificate that the additional security has been entered into.

The most common case of an application for return of duty is on the ground of debts discovered since the grant was obtained. In this case, a schedule showing the additional debts must be supplied. The authorities will not make any

return of duty until all the debts have been paid, nor until the value of the estate has been clearly ascertained. An application for the return of overpaid duty must be made within three years from the date of the grant.

### C1 ACCOUNT

It has already been mentioned that estate duty on real estate may, at the option of the accounting parties, either be paid on the delivery of the inland revenue affidavit leading to the grant, or on delivery of a separate account.

In addition, there are many other cases where duty is payable both in respect of real and personal property, which cannot be dealt with except on the presentation of an account. The most common example is that of the passing of property on the death of a tenant for life either under a will or settlement. Another case is where a deceased domiciled abroad possessed real property in this country. In all these cases, duty is payable on an account.

There is only one form, viz. Account C1. Like the inland revenue affidavit, the account is divided into parts, with schedules where deductions can be made for debts and incumbrances on the real and leasehold properties.

The name, late address, and date of death of the deceased, together with the date of representation should appear in the account with the date and short material particulars of the disposition, with the date of and the names of the parties to any deed, and the name of any testator and the date of probate of his will, the names

and addresses of the present trustees, the beneficiaries, stating the dates of death of any originally entitled who have died and the present addresses of those living, and the consanguinity of the beneficiaries to the deceased and to the predecessor under whose disposition the property is derived.

The property should be valued as at the date of the deceased's death, and where stocks, etc., are publicly quoted, the price should be estimated at one-quarter up from the lower to the higher of the closing prices. Where the death occurred on a Sunday or other day for which no prices are available, the price may be taken either for the first day before or the first day after the death on which prices are available. Where the assets included in the account include shares, debentures, etc., of companies which have been valued according to the official list of a provincial stock exchange, a copy of that list should be attached. Where there is no official market quotation, the estimate should be supported by other published quotations, or broker's certificates or letters from the secretaries of the companies. Any such letter or certificate should show the date, price and amount of recent sales in the open market or particulars of the last three years' dividends, and of the amounts carried forward in those years, as well as the basis of the valuation. If there have been no such recent sales, the date, price and amount of the last sale in the open market should be given. If any bonus has been distributed, the facts should also be stated. Balance sheets may be required to be produced, but need not be furnished in the

first instance. In the case of National Savings Certificates, unless a letter is attached from the Controller, Money Order Department, stating the value, details should be given showing the number of certificates, and the price paid for, and date of purchase of, such certificates.

As with the inland revenue affidavit, questions are raised on the account by means of official observations. The account may be transmitted by post for assessment and, while it has to be lodged in duplicate, only one copy need be sworn.

### INSTALMENTS OF DUTY ON REAL ESTATE

As already mentioned, estate duty on real property may be paid either in one sum or by instalments. For payment of the second and subsequent instalments, the appropriate form is C3 whether the first payment was made upon an inland revenue affidavit or C1 account. The form need not be sworn and requires to be rendered in duplicate only where part of the property has been sold, and may be delivered by post in the same way as a C1 Account. It should, however, be noted that if an instalment of settlement estate duty is payable at the same time as an instalment of estate duty, separate forms must be used. Both kinds of estate duty cannot be accounted for on the same form.

If the property is sold, any balance of estate duty must be paid immediately on completion of the sale, although some instalments have not become payable.

## SETTLEMENT ESTATE DUTY

This duty was by the Finance Act, 1914, s. 14, abolished in the case of deaths occurring after the 11th May, 1914. So far as present day practice is concerned, it should be borne in mind that on the first occasion on which estate duty becomes payable upon a death since 15th August, 1914, an allowance may be taken where, but for the abolition of settlement estate duty, that duty and not estate duty would have been payable on the property, of the settlement estate duty already paid (see further Form A2, clause 59 (ii), page 66).

## LEGACY DUTY ACCOUNTS

Legacy duty is payable on the value of the gift or legacy receivable by the legatee and is payable only in respect of personal property. The duty falls due at the date of death of the testator or intestate, but is payable on the value of the legacy at the date of payment or retainer. Executors have one year within which to administer the estate, though this does not mean that they are compelled to wait that period if they are in a position to distribute sooner, and interest only becomes payable on a legacy if it is not paid until after the expiration of twelve months after the death. As an example, a testator bequeaths a legacy of £500 to a stranger in blood and the executors do not pay the legacy until two years after the testator's death. Interest is payable to the legatee at 4 per cent and duty is therefore payable (at 10 per cent) on £520, i.e. the £500 legacy and £20 interest.



If the legacy is of specific articles (e.g. furniture or jewellery) the value is in most cases fixed by valuation.

In the cases of ordinary specific legacies no difficulty should be experienced in preparing and passing the necessary account. The receipt should be filled in and the duty paid before the legacy is paid or handed over.

In the case of an annuity, the value is ascertained by capitalising the annuity according to the age of the annuitant by reference to the tables to the Succession Duty Act, 1853. This Table is shown on page 39.

The duty on annuities may be paid by four equal yearly instalments, the first to be due twelve months after the death. Interest on the whole unpaid duty has to be added to the second and subsequent instalments. If the annuitant dies before all the instalments are paid, the duty is payable on the annuity then already accrued. If the will contains a bequest of a stated sum of money for the purchase of an annuity, duty is payable on that sum, but if the direction is to purchase an annuity of a stated amount, then duty is payable on the capitalised value calculated according to the Succession Duty Act Table set out on opposite page.

Intimations as to claims for legacy and other duties are given by the authorities after they have had an opportunity of considering the will and the inland revenue affidavit. These intimations, or rather, claims, always indicate the numbers of the forms necessary to be carried in for payment of the duties claimed.

TABLE SHOWING THE VALUES OF AN ANNUITY OF £100  
HELD ON A SINGLE LIFE, AS GIVEN IN THE SCHEDULE  
TO THE SUCCESSION DUTY ACT, 1853

Years of Age	Values			Years of Age	Values		
	£	s.	d.		£	s.	d.
Birth	1892	8	6	48	1300	9	6
1	1906	13	0	49	1271	19	6
2	1919	2	0	50	1242	19	6
3	1926	8	0	51	1213	17	0
4	1928	16	0	52	1185	14	0
5	1926	19	6	53	1157	17	6
6	1921	12	0	54	1130	13	0
7	1913	4	6	55	1103	18	0
8	1902	16	6	56	1077	10	0
9	1890	19	6	57	1051	10	0
10	1878	3	0	58	1025	10	0
11	1864	7	0	59	999	1	0
12	1849	12	0	60	972	1	0
13	1833	18	6	61	943	15	6
14	1817	7	6	62	914	2	0
15	1800	8	6	63	883	6	0
16	1783	13	0	64	852	9	0
17	1767	16	0	65	821	12	6
18	1753	5	6	66	790	15	0
19	1740	11	0	67	761	19	0
20	1729	9	6	68	733	8	6
21	1719	17	0	69	705	4	0
22	1713	1	0	70	677	9	0
23	1706	16	6	71	650	8	0
24	1700	11	6	72	623	19	6
25	1694	0	0	73	597	7	6
26	1686	14	6	74	569	13	0
27	1677	5	6	75	541	0	6
28	1667	1	0	76	511	9	6
29	1656	1	0	77	477	17	0
30	1644	7	6	78	444	9	6
31	1632	0	0	79	412	9	6
32	1619	0	6	80	381	3	0
33	1605	4	0	81	350	14	6
34	1590	9	6	82	321	14	6
35	1574	17	6	83	292	10	0
36	1558	9	6	84	263	2	0
37	1541	10	6	85	234	18	6
38	1524	0	0	86	207	16	0
39	1506	1	6	87	184	11	6
40	1487	10	0	88	164	17	6
41	1468	4	0	89	148	7	0
42	1447	11	6	90	133	9	0
43	1426	2	0	91	122	16	0
44	1403	10	0	92	107	7	0
45	1379	14	6	93	93	3	0
46	1354	16	6	94	79	8	6
47	1328	2	6	95	64	11	0

## SUCCESSION DUTY ACCOUNTS

Shortly, succession duty is a charge upon certain classes of property, the beneficial interest in which, or the income whereof, passes wholly or partially because or on the occasion of the death of any person, by means of a transfer. The transfer may be either by a disposition or by devolution. The person who confers or gives the property, or from whom the property is derived is called "the predecessor" and the person who becomes entitled to, or on whom the beneficial interest is conferred, is called the "successor."

In the preparation of succession duty accounts, the main difficulty is in ascertaining who is the "predecessor," as the rate of duty depends on the relationship between the predecessor and the successor.

In *Hanson on Death Duties* (8th Edition, page 44), the following rules are given—

- (1) An heir coming into possession as heir either in tail or in fee of a previous holder, takes for the purpose of succeeding by devolution from the last possessor of the estate, who is the predecessor.
- (2) Where the person coming into possession does so as a person named or designated, e.g. as the first of a new series of stirps, he takes for the purpose of succeeding by disposition from the settlor or testator, who is the predecessor.
- (3) Where a succession is created by the exercise of a power of appointment (whether general or special) the instrument creating the power, whether a deed or will, is the disposition. The appointment is read into this instrument, and the predecessor ascertained accordingly.
- (4) Except in the two cases following—
  - (a) If the power is a general power which can be exercised by the donee for his own benefit and which takes effect (i.e. becomes certainly operative) upon the death of any person, then the donee of the power when he exercises it is to be taken to be entitled to a succession from the donor of the power.

And if the donee of the power so exercises the power as to create a new succession, he becomes the predecessor, his appointment the disposition, and his appointee the successor.

For example, X by deed settles property on A for life, remainder to B (A's husband) for life, remainder in default of issue of A and B, as A shall appoint. This power "takes effect" on B's death without issue, and if A survives and exercises the power, she takes a succession from X, and if she so appoints as to create a succession, she is the predecessor, and the instrument of appointment the disposition.

- (b) If the power be a general power and the property in default of appointment goes to the donee of the power absolutely, it is considered that any transfer (creating a succession) by him, whether by appointment or conveyance, is a disposition by him, as predecessor. This is in accordance with the rule, that in this subject the substance is to be regarded rather than the form. In the case supposed, the donee of the power is also the owner of the property, and whether he chooses to transfer it by recourse to the power or by conveyance of his estate, it is clear that he is dealing with the property as its owner, and ought therefore so to be treated.

Where a father settles property on his son or daughter on marriage, he is the predecessor, so also where a husband settles property on himself, his wife and children.

In cases where death occurs after the 2nd August, 1894, and the successor is competent to dispose of the property, the duty is calculated on the principal value of the realty at the date of death of the person giving rise to the claim. If the successor is not competent to dispose of the property, then the interest of the successor is treated as an annuity equal to the net annual value of the property. The capital value is then ascertained in accordance with the Table to the Succession Duty Act. If the successor's interest be for the term of life of another person, the

capital value is ascertained from the tables by reference to the age of such other person or of the successor, whichever is the elder. If the successor's interest be for a term of years, the capital value is ascertained from the tables and would be equal to the value of an annuity of the same amount as the annual value of the property for the number of years of the successor's interest.

In the case of agricultural property, where no part of the value is due to the expectation of an increased income therefrom, the principal value, where the succession arose before the 30th April, 1909, is not to exceed twenty-five times the annual value as assessed under Schedule A of the Income Tax Acts, after making such deductions as have not been allowed in that assessment, but are allowed under the Succession Duty Act (e.g. for tithes not separately assessed, repairs, sea walls and level rates, insurance, etc.) and making a deduction for expenses of management not exceeding 5 per cent of the annual value so assessed.

This mode of assessment, however, was abolished by the Finance Act, 1910, s. 61, except in the case of tenancies from year to year, and estates the net value of which do not exceed £1000.

As regards the latter, it should be noted that property the net value of which (exclusive of property settled otherwise than by the will of the deceased) does not exceed £1000, is a separate estate non-aggregable.

In the case of a succession to personal property, if the successor is absolutely entitled, duty is payable on the principal value, but a limited successor pays on the principal value of an annuity

or yearly income, estimated in accordance with the Succession Duty Tables.

The duty on realty may be paid in advance under a discount of 4 per cent within twelve months of the succession, or by eight equal yearly or sixteen half-yearly instalments if the successor is competent to dispose of the property, or by eight half-yearly instalments if the successor is not competent to dispose of the property, the first payment becoming payable at the expiration of twelve months from the date of the succession, and the remainder, with interest on the unpaid instalments, at intervals of twelve months or six months. If the successor, being competent to dispose of the property, dies before all the instalments are paid, the outstanding instalments must be paid. If the successor is not competent to dispose, the remaining instalments cease to be payable.

The duty on personalty is payable immediately if the successor takes an absolute interest, but if he only takes a limited interest, e.g. for life, then it is payable by four equal yearly instalments, the first payable twelve months after the successor becomes entitled in possession and the remaining instalments at intervals of one year each.

## CHAPTER VI

### THE RESIDUARY ACCOUNT

Of all the accounts necessary in probate practice, the residuary account is the most troublesome and difficult to prepare, and the object of the account should be clearly understood. This can better be explained by a simple example. A by his will devises his residence and grounds to his brother B; bequeaths a legacy of £2000 to his brother C and gives the residue of his estate to his sister D. Here the succession and legacy duty in respect of the specific devise and bequest to B and C would be accounted for on a succession duty and legacy duty account respectively. The gift of residue to D would however escape duty were it not for the residuary account. It should, however, be remembered that where the deceased's nett estate does not, at the date of his death, exceed £1000 in value, neither legacy duty nor succession duty is payable, and consequently a residuary account is not necessary. The account is in reality an account of the dealings with the estate and it is this fact which makes it so difficult to prepare.

The following general observations should be noted. The account must be delivered in duplicate and both copies signed, and where Schedules are attached, each Schedule must be signed in the same way as the Schedules to the inland revenue affidavit. The account may be lodged for assessment by post, and any queries are raised by the

authorities by means of observations in the way previously mentioned.

All rents, profits and interest arising from the personal estate of the deceased, or from the real estate directed to be sold, subsequently to the date of death, and all accretions thereon down to the date of retainer, are considered as part of the estate and must be accounted for.

Where capital moneys have been in the hands of the executor uninvested and which ought to have been invested, interest on the amount at 4 per cent must be included in the account.

Where amounts have been paid on account of residue to the residuary legatees, or any of them, the amounts paid should be accounted for on Legacy Duty Receipt Forms (No. 1) and the duty paid, a deduction being made therefor in the residuary account.

The dates of sale of any property must be given and the amount received stated in the appropriate cash column. The costs of sale should not be deducted from the proceeds, but included in the payments account under the heading of "Expenses attending Executorship or Administration."

Property not converted into money must be valued at the date of rendering the account. This does not mean that the account must be lodged on the actual day. What it really means is that the executors having fixed a date on which to ascertain the value of the residue, must insert that date in the account and the values must be calculated and the residue ascertained as on that date. If there is any delay in rendering the



account, then interest will be charged on the duty payable.

The values of stocks, etc., are ascertained in the same way as already described in connection with the inland revenue affidavit, and in preparing the account generally the notes on the form of account itself should be carefully followed. In many cases the figures to be given will correspond exactly with the figures given in the inland revenue affidavit itself.

The following general observations may be found useful in practice—

*Book Debts.* It very frequently happens in the administration of an estate that debts turn out to be irrecoverable. As a rule the gross amounts must be inserted and an explanation given as to any which are partially or wholly irrecoverable.

*Unpaid Purchase Money.* If during his lifetime the deceased had contracted to sell any part of his real and leasehold property and the purchase was uncompleted at the date of his death, the unpaid balance of purchase money should be stated under item 12. If by the contract the deceased was entitled to the rents up to completion, they should be apportioned only to the date of death. If the purchaser was to receive the rents, then interest on the purchase money (at the rate fixed by the contract) should be accounted for to the date of death. The rents or interest from the date of death to the date of the account should be entered in Account II.

*Personal Property subject to absolute power of appointment.* This item (No. 14) may at first sight cause some perplexity as it may be thought that

property not belonging to the deceased himself should not be brought into the account. An absolute power of appointment is however equivalent to absolute ownership as the deceased could have exercised the power in his own favour. If the deceased did not exercise the power by will, then legacy duty is not payable.

*Goodwill.* If the value of the goodwill as definitely ascertained, differs materially from the value given in the inland revenue affidavit, the authorities may require a corrective affidavit. The authorities may require a balance sheet before accepting the figures.

*Investments made since death of the Deceased.* In the majority of cases, i.e. where the account is rendered within twelve months from the date of death, this item (No. 29) will not be required. There is no object in making investments which may shortly require realisation for the purpose of division among the residuary legatees. Where, however, investments have become necessary, it is suggested that the best method of dealing with this item is by means of an investments account.

*Deductions.* Again many of the items which may be brought into the account as deductions are self-explanatory.

*Probate or Administration.* Under this item may be included the estate duty and the costs of obtaining the grant, including the court fees.

Estate duty upon real estate not included in the account, i.e. upon real estate which does not form part of the residuary estate, cannot be deducted, but if by the will such duty is charged upon the residuary estate, then it may be deducted.

*Funeral Expenses.* This deduction will usually be the same as in the inland revenue affidavit. The cost of a tombstone cannot be deducted, unless directed by the deceased's will.

*Executorship Expenses.* These include solicitor's costs (including the estimated costs of preparing and passing the residuary account), the personal expenses of the executors and the expenses of realising any part of the personal estate where the *gross* amounts are accounted for (Items 1 to 29). Any loss on the realisation of stocks may be included and the expenses of sale of the real estate where the proceeds of sale are accounted for in the account.

*Pecuniary Legacies.* The deduction may include the duty on the legacies where they are given free of duty.

# APPENDIX I

## FORM A—2. [INSTRUCTIONS].

[For use where the Deceased died after the 1st August, 1894.]  
ESTATE DUTY.

### INLAND REVENUE

INSTRUCTIONS as to ESTATE DUTY in respect of Property passing on the Deaths of Persons dying after the 1st August, 1894. Finance Acts, 1894 to 1931.

OBSERVE.—(1) The references in these Instructions are to the Finance Act, 1894, unless it is otherwise stated.

- (2) Throughout these instructions read for "Great Britain":  
(i) "the United Kingdom" when the death occurred before the 22nd November, 1921; and (ii) "Great Britain and Ireland (exclusive of Northern Ireland)" when the death occurred between the 21st November, 1921, and the 1st April, 1923.

1. ESTATE DUTY, except as expressly provided, is leviable upon the principal value of all property, real or personal, settled or not settled, which passes on the death of a person who dies after the 1st August, 1894. [See sects. 1 and 24.]

CHARGE OF  
DUTY AND  
PROPERTY  
LIABLE.

2. Property so passing includes (*inter alia*) the following [see sect. 2]—

(i) Property of which the deceased was *competent to dispose* [see sect. 22 (2) (a)] at his death, whether he actually disposed of it by his will or not.

Competent  
to dispose.

(ii) Donations *mortis causa*.

Donations.  
Gifts.

(iii) *Inter vivos* gifts of property made by the deceased within twelve months of his death without reservation, unless he died on or after the 30th April, 1909, in which case, the period is three years instead of twelve months, exclusive of gifts which (1) were made before the 30th April, 1908, (2) were made for public or charitable purposes more than twelve months before the death, (3) were made in consideration of marriage, (4) are proved to the satisfaction of the Commissioners to have been part of the normal expenditure of the deceased, and to have been reasonable, having regard to the amount of his income, or to the circumstances, or (5) which, in the case of any donee, do not exceed in the aggregate £100 in value or amount. [See Finance (1909–10) Act, 1910, sect. 59.]

(iv) *Inter vivos* gifts made by the deceased at any time, whereof *bona fide* possession was not immediately taken and thenceforth retained to the entire exclusion of the deceased, but a benefit, either charged upon the property or not, was reserved or secured to the deceased by contract

Gifts with  
reservation.

or otherwise, or a power or authority was reserved to the deceased, to restore to himself or to reclaim the absolute interest in such property, or in some part of it. Where, however, the deceased died on or after the 30th April, 1909, and the benefit reserved or secured to him is afterwards surrendered, so that the property forming the subject matter of the gift is, subsequent to the date of such surrender, enjoyed to the entire exclusion of the deceased and of any benefit to him by contract or otherwise for three years before his death, or if such surrender was made for public or charitable purposes for twelve months before his death, such property is not to be deemed to pass on his death. [See Finance (1909-10) Act, 1910, sect. 59 (3).]

Joint  
Investments.

(v) Property which the deceased, having been absolutely entitled thereto, either by himself alone or by arrangement with some other person, caused to be transferred to or vested in himself and some other person jointly, either by disposition, purchase, investment, or otherwise, so that the beneficial interest in such property, or in some part thereof, passed or accrued by survivorship on his death to such other person.

Joint  
ownerships.

(vi) The deceased's severable share of property of which he was joint tenant or joint owner with another or with others.

Life interests.

(vii) (a) Property which the deceased had an enjoyment of or interest in for life, or for some period determinable by reference to death under an express or an implied trust in a settlement made by the deceased by instrument *inter vivos*, or under an express or implied trust, created by the deceased in writing or otherwise.

(b) Where the deceased died after the 31st March, 1900, and before the 30th April, 1909, and he or any other person had an interest in property limited to cease on the deceased's death, and that interest was disposed of, whether for value or not, to or for the benefit of any person entitled to an interest in remainder or reversion in such property, then the property is nevertheless to be deemed to pass on the deceased's death, unless the disposition was *bona fide* made twelve months before the deceased's death, and *bona fide* possession and enjoyment was immediately assumed thereunder, and thenceforward retained to the entire exclusion of the person who had the interest so limited to cease, and of any benefit to him by contract or otherwise. [See Finance Act, 1900, sect. 11 (1).]

(c) Where the deceased died on or after the 30th April, 1909, the period is three years, instead of twelve months, unless the interest was disposed of before the 30th April, 1908, or for public or charitable purposes. [See Finance (1909-10) Act, 1910, sect. 59 (1).]

(d) In the case of a person dying on or after the 1st August, 1930, where an annuity, or other periodical payment limited to cease on the death of the deceased, charged on property, has been disposed of during the lifetime of the deceased, whether for value or not, to or for the benefit of the person entitled to the property, then,

unless the disposition was made three years before the death of the deceased and no substituted annuity, etc., was secured to the person entitled to the annuity, etc., in return for such disposition, the property is deemed to pass on the death of the deceased to the extent to which a benefit would accrue from the cesser of such annuity, etc. [See Finance Act, 1930, sect. 39.]

(viii) Policies which the deceased effected on his life, and kept up wholly or partially for the benefit of a donee, whether nominee or assignee.

Policies.

(ix) Annuities (other than [see sect. 15 (1)] a single annuity not exceeding £25, or the first granted of two or more such annuities), or other interests, which the deceased, either by himself alone, or in concert or by arrangement with some other person, purchased or provided so that a benefit arose or accrued by survivorship or otherwise, on the death of the deceased.

Annuities.

(x) Property to which the deceased had been entitled either in his own disposition or for life and which, having been transferred to a company, comes within the provisions of sections 34 or 35 of the Finance Act, 1930.

Property transferred to a company [See also Clauses 28 and 34 (iii).] Other property.

And (xi) Property not comprised in any of the foregoing classes in which the deceased or some other person had an interest which ceased on the death of the deceased, to the extent to which a benefit accrued or arose by the cesser of such interest, but exclusive of property the interest in which, of the deceased or other person, was only an interest as holder of an office or recipient of the benefits of a charity, or as a corporation sole.

3. The expression "property" includes real property and personal property, and the proceeds of sale thereof respectively, and any money or investment for the time being representing the proceeds of sale. [See sect. 22 (1) (f).]

Definition of "Property."

4. Property passing on the death includes property passing either immediately on the death, or after any interval, or at a period ascertainable only by reference to death, either certainly or contingently, and either originally or by way of substitutive limitation. [See sect. 22 (1) (l).]

5. A person is deemed *competent to dispose* of property if he has such an estate or interest therein, or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail, whether in possession or not; and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos*, or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life of settled land, or as mortgagee. [See sect. 22 (2) (a).]

Competent to dispose.

6. Money which a person has a general power to charge on property is deemed to be property of which he has power to dispose. [See sect. 22 (2) (c).]

Foreign  
property.

7. Real or leasehold property situate out of Great Britain, devolving on death as such, is not chargeable with Estate Duty. [See sect. 2 (2).]

8. Moveable property situate out of Great Britain is not chargeable with Estate Duty where the deceased was the owner and was domiciled *out* of Great Britain at the time of his death. It is chargeable where the deceased was the owner and was domiciled *in* Great Britain at the time of his death. It is also, speaking generally, chargeable where the deceased was only interested for life, and at his death the property formed the subject of a British trust or was vested in a British trustee. [See sect. 2 (2).]

EXCEPTIONS  
[See also  
Clauses 2 (iii)  
2 (iv) and  
2 (vii) (b)  
and (c).]  
Trust  
property.

9. Estate Duty is not payable on property held by the deceased as trustee for another person under a disposition not made by the deceased, or under a disposition made by the deceased more than 12 months before his death—that event occurring before the 30th April, 1909—where possession and enjoyment of the property was *bona fide* assumed by the beneficiary immediately upon the creation of the trust, and thenceforward retained to the entire exclusion of the deceased, or of any benefit to him by contract or otherwise. [See sect. 2 (3).] Where, however, the deceased died on or after the 30th April, 1909, the period is three years, instead of 12 months unless the trust was created before the 30th April, 1908. [See Finance (1909-10) Act, 1910, sect. 59 (1).]

10. Estate Duty is not payable on property passing on the death of the deceased by reason only of a *bona fide* purchase from the person under whose disposition the property passes, or the falling into possession of the reversion on any lease for lives, or the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee. [See sect. 3 (1).] When any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration is allowed as a deduction from the value of the property. [See sect. 3 (2).]

Seamen and  
soldiers.

11. (i) Estate Duty is not payable on the property of common seamen, marines, soldiers or airmen who are slain or die in His Majesty's Service. [See sect. 8 (1).]

Persons  
killed in war.  
&c.

(ii) Where the deceased died from wounds inflicted, accidents occurring, or disease contracted, within three years before death, while on active service against an enemy, or on service which is of a warlike nature, or which, in the opinion of the Treasury, otherwise involves the same risks as active service, and was a member of H.M. Forces and subject either to the Naval Discipline Act, or to Military law under Part V of the Army Act, or to the Air Force Act, the Treasury may, on the recommendation of

the Secretary of State or the Admiralty, afford total exemption from all death duties in respect of the first £5,000 worth of property passing to the widow and lineal relations or to brothers and sisters and their descendants, and, as to any excess over £5,000 which passed to such persons, the duty is to be discounted for a period equal to the normal expectation of life of the deceased at the time of his death. [See Finance Act, 1924, sect. 38.]

12. Estate Duty is not payable on any pension or annuity payable by the Government of British India to the widow or child of any deceased officer of such Government, notwithstanding that the deceased contributed during his lifetime to any fund out of which such pension or annuity is paid. [See sect. 15 (3).]

Indian  
pensions.

13. (i) Estate Duty is not payable on the death, *prior to the 16th August, 1914*, of the deceased, in respect of personal property settled by a will or disposition made by a person dying before the 2nd August, 1894, in respect of which property Probate, Inventory, or Account Duty has been paid, or is payable, unless in either case the deceased, at the time of his death, or at any time since the will or disposition took effect had been competent to dispose of the property. [See sect. 21 (1).]

Where  
Probate or  
Account  
Duty paid.

(ii) The exemption from Estate Duty in respect of settled personal property conferred by sect. (21) (1) of the Finance Act, 1894, is not, however, to apply where the death of the deceased occurs *after the 15th August, 1914*, unless the duties specified in that subsection were paid or payable upon the death of one of the parties to a marriage, and the death after the 15th August, 1914, is that of the other party to the marriage. [See Finance Act, 1914, sec. 14.]

14. Estate Duty is not payable in respect of any Adwoson. [See sect. 15 (4).]

Adwosons.

15. Estate Duty is not payable where a settlor, who is tenant for life, acquires by the death, on or after the 1st July, 1896, in his own lifetime, of a subsequent limited owner under the settlement, the immediate reversion, or an absolute power to dispose of the whole property. [See Finance Act, 1896, sect. 14.]

Enlargement  
of interest.

16. Estate Duty is not payable where property reverts to a settlor in his lifetime on the death, on or after the 1st July, 1896, of a person having a limited interest under a settlement provided that no other interest is created by the settlement, and that the person having the limited interest had not, prior to the disposition, been competent to dispose of the property. [See Finance Act, 1896, sect. 15 (1), (2), and (3).]

Reverter to  
settlor.

17. Estate Duty is not payable where the deceased was entitled in right of his wife to the rents of her real estate, and by his death, on or after the 1st July, 1896, she becomes entitled to the property in virtue of her former interest. [See Finance Act, 1896, sect. 15 (4).]

Husband and  
wife.  
[See also  
Clause 13  
(ii).]

18. Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property



settled by the other under a disposition which has taken effect before the 2nd August, 1894, and on his or her death the survivor becomes entitled to the *income* (as distinguished from the capital) of the property settled by such survivor, Estate Duty is not payable in respect of that property until the death of the survivor. [See sect. 21 (5).]

Gifts to  
nation, &c.  
[See also  
Clause 27.]

19. (i) Property directed by an instrument *inter vivos* to be held in trust for immediate accumulation and ultimate transfer to the National Debt Commissioners for the reduction of the National Debt, and, absolute gifts *inter vivos* for the same purpose, are exempt from Estate Duty. [See Finance Act, 1928, sect. 30.]

(ii) The Treasury may remit the duty on such pictures, prints, books, manuscripts, works of art, or scientific collections, as appear to them to be of national, scientific, or historic interest, and given for national purposes, or to any University, or to any County Council or Municipal Corporation. [See sect. 15 (2).]

(iii) Where the deceased died on or after the 31st July, 1931, the Treasury may remit the duty on his death, where any estate or interest in land has been given, devised or bequeathed by him either to the National Trust inalienably for the public benefit, or to the Commissioners of Works or a local authority, and accepted by them under section 2 of the Ancient Monuments Consolidation and Amendment Act, 1913, provided such estate or interest was the deceased's whole interest in the land. [See Finance Act, 1931, sect. 40.]

Objects of  
national, &c.  
interest.  
[See also  
Clauses 27  
and 34 (iv).]

20. (i) Objects of national, scientific, or historic interest, admitted by the Treasury to be such, passing on a death on or after the 1st July, 1896, and before the 30th April, 1909, and "settled" so as to be enjoyed in succession in kind only, are not to be charged with Estate Duty until they are actually sold, or are in the possession of some person competent to dispose of them. [See Finance Act, 1896, sect. 20 (1).]

(ii) Where the deceased died on or after the 30th April, 1909, and before the 1st August, 1930, any property—"settled" or not—passing on his death which consists of such pictures, prints, books, &c., not yielding income as appear to the Treasury to be of national, scientific, historic, or artistic interest is only chargeable with Estate Duty when the property is sold, and then only in respect of the last death on which the property passed. [See Finance (1909-10) Act, 1910, sect. 63.] But sales, on or after the 4th August, 1921, of such objects to certain national or public institutions are exempted from the charge of duty. [See Finance Act, 1921, sect. 44, and Finance Act, 1930, sect. 40 (2) (proviso).]

(iii) Where the deceased died on or after the 1st August, 1930, objects of national, etc., interest, so admitted by the Treasury, are not chargeable with Estate Duty; but, if such objects are sold, the proceeds of sale thereof (except as mentioned in the second part of clause 20 (ii)) immediately become chargeable with Estate Duty at the rate

appropriate to the principal value of the estate with which the objects would, but for their specific exemption, have been aggregated on the last death prior to the sale. [See Finance Act, 1930, sect. 40.]

*If it is desired to obtain the benefit referred to in clauses 19 (ii) or (iii), or clause 20, application should be made to the Controller, Estate Duty Office, Inland Revenue, Somerset House, London, W.C.2. The application should be accompanied by a schedule setting forth the particulars and value of the articles, together with a reference to the section or sections under which exemption is sought. If the articles (or any of them) have been sold, the date of the sale and the gross amount realised should be stated.*

*If the application falls to be made under the provisions of sect. 20 (1) of the Finance Act, 1896, it should, in addition, disclose whether the articles are in the possession of a person competent to dispose thereof.*

21. Where an estate, in respect of which Estate Duty is payable on the death of a person dying on or after the 30th April, 1909, comprises land on which timber, trees, wood, or underwood are growing, the value of such timber, trees, wood, or underwood is not to be taken into account in estimating the principal value of the estate or the rate of Estate Duty, and Estate Duty is not payable on such value, but the Estate Duty, at the rate due to the principal value of the estate, is payable on the net moneys (if any), after deducting all necessary outgoings since the death of the deceased, which may from time to time be received from the sale of timber, trees, or wood when felled or cut during the period which may elapse until the land, on the death of some other person, again becomes liable to Estate Duty.

Timber,  
trees, wood  
and  
underwood.

The owners or trustees of the land are to account for and pay the duty as and when the moneys are received, together with interest—see Clause 53—from the date of receipt.

If, however, the timber, trees or wood are sold at any time, either with or apart from the land on which they are growing, Estate Duty is payable upon the principal value thereof, as at the death of the deceased, after deducting any Estate Duty already paid upon the proceeds of the sale of any timber felled and sold since that date. [See Finance Act, 1912, sect. 9 and Finance (1909-10) Act, 1910, sect. 61 (5).]

22. (i) If Estate Duty has already been paid in respect of settled property since the date of the settlement, neither it nor the Settlement Estate Duty is again payable in respect thereof, *where the deceased died before the 16th August, 1914, unless he was, at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose* [see sect. 22 (2) (a)] thereof [see sect. 5 (2)], and unless the deceased, if on his death subsequent limitations under the settlement take effect in respect of such property, was *sui juris* at the time of his

Where  
Estate Duty  
not twice  
payable  
under same  
settlement.

death, or had been *sui juris* at any time while so competent to dispose of the property. [See Finance Act, 1898, sect. 13.]

Abolition of relief in respect of settled property.

(ii) The exemption from a second or subsequent Estate Duty in respect of settled property conferred by sect. 5 (2) of the Finance Act, 1894, is not, however, to apply *where the death of the deceased occurs after the 15th August, 1914*, unless the Estate Duty has been paid upon the death of one of the parties to a marriage, and the death after the 15th August, 1914, is that of the other party to the marriage. [See Finance Act, 1914, sect. 14.]

Limitation of relief from Estate Duty in respect of settled property.

23. (1) In the case of persons dying on or after the 30th April, 1909, and before the 16th August, 1914, the payment of or liability to duty in respect of an interest in expectancy in any settled property, whether the payment was made or the liability attached before, on, or after the 30th April, 1909, is not to be deemed to be a payment of or liability to duty in respect of the settled property itself, so as to obtain the relief from Estate Duty conferred by sect. 5 (2) or sect. 21 (1) of the Finance Act, 1894, unless the owner of the expectant interest was himself the settlor of the property. [See Finance (1909-10) Act, 1910, sect. 55.]

(ii) The relief so conferred by sects. 5 (2) and 21 (1) of the Finance Act, 1894, is withdrawn in the case of any person dying after the 15th August, 1914. [See Finance Act, 1914, sect. 14.]

Where interest fails before possession and settlement continues.

24. In the case of settled property where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property is not deemed to pass on his death. [See sect. 5 (3).]

AGGREGATION  
[See also  
Clauses 11  
(ii), 21 and  
50.]

25. (i) For determining the rate of Estate Duty to be paid in respect of any property passing on the deceased's death, all property so passing, in respect of which Estate Duty is leviable, is to be aggregated so as to form one estate, and the duty is to be levied at the proper rate on the principal value thereof. Provided that any property so passing in which the deceased never had an interest is not to be aggregated with any other property, but is to be an estate by itself, and Estate Duty is to be levied at the proper rate on the principal value thereof. [See sect. 4.]

(ii) But where the deceased died after the 1st August, 1894, and prior to the 9th April, 1900, sect. 4 of the Finance Act, 1894, also operates to exclude from aggregation property which, under a disposition not made by the deceased, passed to persons other than the wife or husband or a lineal ancestor or descendant of the deceased. [See sect. 4, and also Finance Act, 1900, sect. 12 (1).]

(iii) *Settled* property, however, where the disponent died on or before the 1st August, 1894, and such property, if he had died after that date, would have been chargeable with Estate Duty on *his* death, is (a) on a death after the

8th April, 1900, and prior to the 19th April, 1907, only to be aggregated to a limited extent; and (b) on a death after the 18th April, 1907, and prior to the 29th July, 1927, to be treated as an estate by itself. [See Finance Act, 1907, sect. 16, and Finance Act, 1927, sects. 51 and 57 (6).]

26. Where the net value of the property, real and personal, in respect of which Estate Duty is payable on the death of the deceased—where the death occurs *at any time after the 1st August, 1894*—including property over which the deceased had and exercised by will a general power of appointment, and property which by default of exercise of the power of appointment belonged to the deceased absolutely, but exclusive of other property settled otherwise than by the will of the deceased, does not exceed £1,000, such property is not to be aggregated with any other property, but is to form an estate by itself. [See sect. 16 (3).]

Small estates.  
[See also  
Clauses 67,  
68 and 71.]

27. (i) Gifts of pictures, prints, books, manuscripts, works of art and scientific collections, of national, scientific, or historic interest, given for national purposes, or to any University, or to any County Council or Municipal Corporation, the Estate Duty whereon has been remitted by the Treasury, are not to be aggregated with any other property. [See sect. 15 (2).]

Gifts to nation.  
[See also  
Clause 19.]

(ii) Where the deceased died on or after the 31st July, 1931, the property referred to in Clause 19 (iii), on which the duty is remitted, is not to be aggregated with any other property. [See Finance Act, 1931, sect. 40.]

(iii) Objects of national, scientific, or historic interest, admitted by the Treasury to be such, as passing on a death on or after the 1st July, 1896, and before the 30th April, 1909, and “settled” so as to be enjoyed in succession in kind only, are to form an estate by itself. [See Finance Act, 1896, sect. 20 (1).]

Objects of national, &c., interest.  
[See also  
Clauses 30 & 34 (iv).]

(iv) Where the deceased died on or after the 30th April, 1909, and before the 1st August, 1930, any property—“settled” or not—passing on his death which consists of such pictures, prints, books, &c., not yielding income as appear to the Treasury to be of national, scientific, historic, or artistic interest is not to be aggregated with other property, but is to form an estate by itself. [See Finance (1910–10) Act, 1910, sect. 63.]

(v) Where the deceased died on or after the 1st August, 1930, the value of the property described in (iv) above is not to be taken into account in estimating the principal value of the estate passing on the death. [See Finance Act, 1930, sect. 40 (1).] For the principle on which the rate of duty on the proceeds of sale is ascertained, see Clause 20 (iii).

28. Property transferred to a company and chargeable with Estate Duty under sections 34 or 35 of the Finance Act, 1930, is not to be aggregated with any other property but is to form an estate by itself. [See Finance Act, 1930, sects. 34 (7) and 35 (3).]

Property transferred to a company.  
[See also  
Clauses 2 (x)  
and 34 (iii).]

SETTLEMENT  
ESTATE  
DUTY  
[See also  
Clauses 56  
and 59 (ii).]

29. (i) Where property, in respect of which Estate Duty is leviable *upon the death of a person dying before the 12th May, 1914*, is settled by the will of the deceased or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not *competent to dispose* [see sect. 22 (2) (a)] of the property, a further Estate Duty called "Settlement Estate Duty" is leviable upon the principal value of the settled property, except where the only life interest in such property, after the deceased's death, is that of the husband or wife of the deceased [see sect. 5 (1) (a)] or where the disposition took effect before the 2nd August, 1894 [see sect. 21 (4)], or, under the deceased's will, where the net value of the property in respect of which Estate Duty is leviable on the death of the deceased, exclusive of property settled otherwise than by the deceased's will, does not exceed £1,000. [See sect. 16 (3).]

(ii) Where on a death on or after the 1st July, 1898, and before the 12th May, 1914, Settlement Estate Duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property is to be repaid. [See Finance Act, 1898, sect. 14.]

(iii) "Settled Property" is property comprised in a "settlement" [see sect. 22 (1) (h)], and a "settlement" is any instrument which is a settlement within the meaning of sect. 2 of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust. [See sect. 22 (1) (i).]

Abolition of  
Settlement  
Estate Duty.

(iv) *In the case of any person dying after the 11th May, 1914*, Settlement Estate Duty is not to be levied. [See Finance Act, 1914, sect. 14.]

30. The Settlement Estate Duty leviable in respect of personal property settled by the deceased's will (unless the will contains an express provision to the contrary), is, *where the deceased died on or after the 1st July, 1896, and before the 12th May, 1914*, to be payable out of the settled property in exoneration of the rest of the deceased's estate. [See Finance Act, 1896, sect. 19 (1).]

Crown  
entails.  
[See also  
Clause 39.]

31. Where lands or chattels are so settled by Act of Parliament or Royal grant that no one of the persons successively entitled can alienate the same, Settlement Estate Duty is not payable. [See sect. 5 (5).]

Deduction  
of Stamp  
Duty paid on  
settlement.

32. The *ad valorem* stamp duty (if any) charged on a settlement may be deducted from the Settlement Estate Duty (if any) payable thereunder [see sect. 5 (4)], but the settlement must be produced in support of the deduction.

ACCOUNT-  
ABLE  
PERSONS.  
Executor.

33. (i) The executor of the deceased is to pay the Estate Duty in respect of all personal property, wheresoever situate, of which the deceased was *competent to dispose* [see sect. 22 (2) (a)] at his death, except such objects of national, &c., interest as are within Clause 20 above, on delivering the Inland Revenue Affidavit, and may pay in like manner the Estate Duty on any other property passing on such

death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or in the case of property not under his control, if the persons accountable for the duty thereon request him to make such payment. [See sects. 6 (2) and 8 (3).] The executor is not liable for any Estate Duty in excess of the assets which he has received as executor, or might, but for his own neglect or default, have received. [See sect. 8 (3).] The Settlement Estate Duty (if any) [see Clause 29 (iv)] leviable in respect of any personal property "settled" by the deceased's will, is to be collected upon an Account to be delivered by the executor within six months after the death. [See Finance Act, 1896, sect. 19 (2).]

(ii) Where the deceased died on or after the 1st January, 1926, the executor is also accountable for the Estate Duty which may become leviable or payable in respect of land in England and Wales (including settled land) which devolves upon him by virtue of any statute or otherwise. [See Law of Property Act, 1925, sect. 16 (1).]

34. (i) Where property passes on the death of the deceased, and his executor is not accountable for the Estate Duty thereon, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title, is accountable for the Estate Duty on the property. [See sect. 8 (4).] [See also Clauses 20 and 21.]

Other  
persons  
accountable.

(ii) Where the deceased died on or after the 1st January, 1926, and the executor is not accountable for the Estate Duty in respect of land in England and Wales, the estate owner (other than a purchaser who acquires a legal estate after the charge for death duties has attached and free from such charge) is accountable. [See Law of Property Act, 1925, sect. 16 (2).]

(iii) In the case of property transferred to a company being deemed to pass on a death for Estate Duty purposes under sections 34 or 35 of the Finance Act, 1930, the company is accountable for the duty. [See Finance Act, 1930, sect. 36.]

Company  
accountable.  
[See also  
Clauses 2 (x)  
and 28.]

(iv) Where on a death on or after the 1st August, 1930, the proceeds of sale of objects of national, etc., interest become chargeable with Estate Duty the person by whom or for whose benefit the objects were sold is accountable for the duty. [See Finance Act, 1930, sect. 40 (2).]

Objects of  
national, etc.  
interest sold.  
Vendor or  
beneficiary  
accountable.  
[See also  
Clauses 20  
and 27.]

35. (i) A *bona fide* purchaser for valuable consideration without notice is not liable to or accountable for duty. [See sect. 8 (18).]

Purchaser  
without  
notice.

(ii) In the case of land (not registered land, as to which see Land Registration Act, 1925, sect. 73) passing on a

death on or after the 1st January, 1926, a purchaser acquiring a legal estate takes free from any charge for death duties except where a charge in respect thereof has been registered as a land charge. [See Law of Property Act, 1925, sect. 17 (1).]

An Account  
to be  
delivered.

36. Estate Duty, so far as not paid by the executor, is collected upon an Account setting forth the particulars of the property. It is to be delivered to the Commissioners of Inland Revenue within six months after the death by the person accountable for the duty. [See sect. 6 (4).] [See also Clauses 20 and 21.]

PRINCIPAL  
VALUE.  
[See also  
Clause 68.]

37. (i) Where the deceased died before the 30th April, 1909, the principal value of any property passing on that event is the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death. Provided that in the case of any agricultural property, i.e. agricultural land, pastures, and woodland, and such cottages, farm buildings, farm houses, and mansion houses (together with the lands occupied therewith) as are of a character appropriate to the property [see sect. 22 (1) (g)]—where no part of the principal value is due to the expectation of an increased income from such property—the principal value shall not exceed twenty-five times the annual value, as assessed under Schedule A of the Income Tax Acts, after making such deductions as have not been allowed in that assessment, and are allowed under the Succession Duty Act, 1853, and making a deduction for expenses of management not exceeding five per cent of the annual value so assessed. [See sect. 7 (5).]

(ii) Where, however, the deceased died on or after the 30th April, 1909, the Commissioners, in estimating the principal value of any property, are to fix the price according to the market price at the time of the death, without allowing any reduction on the ground that the whole property is to be placed on the market at one and the same time, unless it is proved to the Commissioners that the value of the property has been depreciated by reason of the death of the deceased, in which case, such depreciation is to be taken into account. [See Finance (1909–10) Act, 1910, sect. 60. See also sect. 18 of the Finance Act, 1911, which declares that, in estimating, for the purposes of sect. 7 (5) of the Finance Act, 1894, the principal value of any agricultural property which comprises cottages occupied by persons employed solely for agricultural purposes in connection with the property, no account is to be taken of any value attributable to the fact that the cottages are suitable for the residential purposes of any persons other than agricultural labourers or workmen on the estate.]

Agricultural  
property.  
[See also  
Clauses 44  
and 69.]

(iii) Where the deceased died on or after the 30th June, 1925, the Estate Duty payable in respect of agricultural property is charged on the agricultural value thereof at the appropriate rate under the scale of rates in the Finance Act, 1919, and on any amount by which the principal value

exceeds the agricultural value (called the excess principal value) at the appropriate rate as set out in Clause 64 (vii) or (viii). [See Finance Act, 1925, sect. 23.]

(iv) In the case of shares in a company (not being preference shares) passing on a death on or after the 1st August, 1930, where either (a) a sum of money computed by reference to the value of the total assets of the company is deemed to pass in connection with the death of the deceased by virtue of Section 34 of the Finance Act, 1930, or (b) the deceased, immediately before death, held a controlling interest in the company (as defined in Section 37 (2) of the Finance Act, 1930) then, unless such shares have, within the period of twelve months preceding the death, been the subject of dealings on a recognised stock exchange in the United Kingdom or been quoted in the official list of such exchange, the principal value of those shares for the purposes of Estate Duty is not to be ascertained in the manner provided by Section 7 (5) of the Finance Act, 1894, but by reference to the value of the total assets of the company. In regard to (a) above there is a provision to avoid a double charge for Estate Duty on the deceased's death. [See Finance Act, 1930, sect. 37.]

Company shares (in certain circumstances).

38. The value of the benefit accruing or arising on the death of a deceased person from the cesser of an interest in any property is the principal value of the property where the interest extended to the whole income of the property, but where it extended to less than the whole income it is the principal value of an addition to the property equal to the income to which the interest extended. [See sect. 7 (7).]

Cesser of an interest.

39. Where lands or chattels are so settled by Act of Parliament or Royal grant that no one of the persons successively entitled can alienate the same, the property passing on the death of any person in possession thereof is the interest of his successor, and the value is the life interest value as for Succession Duty. [See sect. 5 (5), and the Succession Duty Act, 1853, sect. 21.] The duty may however, at the option of the person authorised or required to pay the same, be treated as a charge on and be raised and paid out of the corpus of such lands or chattels. [See Finance Act, 1922, sect. 44.]

Crown entails.  
[See also Clause 31.]

40. Where the Commissioners are satisfied that any additional expense in administering or in realising foreign property has been incurred by reason of the property being situate out of Great Britain, an allowance for such expense not exceeding 5 per cent on the value of the property is made. [See sect. 7 (3).]

Administration expenses of property out of Great Britain.

41. Where the Commissioners are satisfied that by reason of the deceased's death any duty in respect of foreign property is payable in the country where the property is situate, an allowance of the amount of the duty is made from the value of the property. [See sect. 7 (4).]

Foreign duty.

42. Every estate is to include all income upon the property included therein down to and outstanding at the date of the deceased's death. [See sect. 6 (5).]

Income and interest.



Funeral  
expenses  
and debts.

43. Allowance against the gross principal value of an estate is made for reasonable funeral expenses and for debts and incumbrances (including mortgages or terminable charges [see sect. 22 (1) (k)]), incurred or created by the deceased *bona fide* for full consideration in money or money's worth wholly for his own use and benefit, and which take effect out of his interest. [See sect. 7 (1) (a).]

Apportion-  
ment of  
mortgage  
debts, &c.,  
on agricul-  
tural prop-  
erty.  
[See also  
Clause 37  
(iii).]

44. Where any agricultural property is subject to a mortgage, debt or incumbrance in respect of which an allowance is to be made for Estate Duty purposes, such mortgage, debt or incumbrance, where the deceased died on or after the 30th June, 1925, is to be apportioned between the agricultural value and the excess principal value for the purposes of the Finance Act, 1925, sect. 23 (1). [See Finance Act, 1925, sect. 23 (3).]

Limitation  
on debts  
deductible.

45. Where a debt or incumbrance has been incurred or created in whole or in part for the purpose of or in consideration for the purchase or acquisition or extinction, whether by operation of law or otherwise, of any interest in expectancy in any property passing or deemed to pass on death, and any person whose interest in expectancy is so purchased, acquired or extinguished becomes entitled to any interest in such property, either under any disposition made by the deceased, or under his intestacy or through devolution of law from him, the value of the estate of the deceased for the purpose of Estate Duty is, where he died on or after the 29th April, 1910, to be determined without allowance in respect of such debt or incumbrance, and any property charged therewith is to be deemed to pass freed therefrom.

Provided that—

(i) If part only of the debt or incumbrance was incurred or created for the purpose or consideration stated, this provision is to apply only to that part, and

(ii) If a person whose interest in expectancy in the property so purchased, acquired or extinguished becomes entitled to an interest in a part only of that property, this provision is to apply only to the same fractional part of the debt or incumbrance as the value of the part of the property to an interest in which he becomes entitled bears to the value of the whole of that property. [See Finance (1909–10) Act, 1910, sect. 57.]

Debts in  
respect  
whereof re-  
imbursement  
claimable.

46. No allowance can be made for any debt in respect whereof there is a right to reimbursement from any other estate or person unless such reimbursement cannot be obtained. [See sect. 7 (1) (b).]

Foreign  
debts.

47. An allowance is not made in the first instance for debts due from the deceased to persons resident out of Great Britain unless contracted to be paid in Great Britain or charged on property situate within Great Britain, except out of the value of any personal property of the deceased situate out of Great Britain on which Estate Duty is paid. No repayment of Estate Duty is made in respect of any such debts except to the extent to which

the personal property of the deceased situate out of Great Britain is shewn to be insufficient for their payment. [See sect. 7 (2).]

48. Where an estate includes an interest in expectancy (and this expression covers an estate in remainder or reversion and every other future interest, whether vested or contingent, but does not include reversions expectant upon the determination of leases [see sect. 22 (1) (j)]), Estate Duty in respect of that interest is to be paid, at the option of the person accountable for the duty, either with the duty on the rest of the estate or when the interest falls into possession. [See sect. 7 (6).] If the duty is not paid with the Estate Duty on the rest of the estate, then for the purpose of determining the rate of Estate Duty in respect of the rest of the estate, the value of the interest is to be its value at the date of the death of the deceased. [See sect. 7 (6) (a).] The rate of Estate Duty upon the interest when it falls into possession is to be calculated according to its value at that time, together with the value of the rest of the estate as previously ascertained. [See sect. 7 (6) (b).]

INTERESTS IN  
EXPECTANCY.

49. The Commissioners, in their discretion, upon application by a person entitled to an interest in expectancy, may commute the Estate Duty which would or might, but for the commutation, become payable in respect of such interest for a certain sum to be presently paid, and for determining that sum they will put a present value upon that duty, regard being had to the contingencies affecting the liability to, and rate and amount of, such duty. [See sect. 12.]

Commuta-  
tion on  
interest in  
expectancy.

50. (i) Where an interest in expectancy has, before the 2nd August, 1894, been *bona fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on such property is payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if the Finance Act, 1894, had not passed. In the case of a mortgage, any higher duty payable by the mortgagor is to rank as a charge subsequent to that of the mortgagee. [See sect. 21 (3).]

Where  
interest in  
expectancy  
sold or  
mortgaged.

(ii) Each of the undermentioned Finance Acts contains a similar provision as to interests in expectancy *bona fide* sold or mortgaged for full consideration in money or money's worth before a date stated in the appropriate section, as follows—

Finance Act, 1900, sect. 12 (1) (proviso), 9th April, 1900;  
Finance Act, 1907, sect. 12 (proviso), 19th April, 1907;  
Finance (1909-10) Act, 1910, sect. 64, 30th April, 1909;  
Finance Act, 1914, sect. 16, 11th May, 1914;  
Finance Act, 1919, sect. 29 (proviso), 30th April, 1919;  
Finance Act, 1925, sect. 22 (proviso), 23th April, 1925;  
Finance Act, 1927, sect. 51 (proviso), 11th April, 1927;  
Finance Act, 1930, sect. 33 (proviso), 14th April, 1930;  
but in the last-named Act and section an exception is made in the case of property deemed to pass on a death by reason of section 35 of the same Act.

**WHEN DUTY IS DUE.**

51. The duty, which is to be collected upon an Inland Revenue Affidavit or Account, is due on the delivery thereof, or at the expiration of six months from the death, whichever first happens. [See sect. 6 (7).] [See also Clauses 20 and 21.]

**Payment of additional duty.**

52. Estate Duty is, in the first instance, calculated at the appropriate rate according to the value of the estate, as set forth in the Inland Revenue Affidavit or Account delivered, but if afterwards it appears that for any reason too little duty has been paid, the additional duty is payable, and is treated as duty in arrear. [See sect. 8 (7).]

**Interest on duty.**

53. Simple interest at 3 per cent per annum (except when accruing due between the 30th July, 1919, and the 26th April, 1933, when the rate is 4 per cent), without deduction for income tax, is payable upon all Estate Duty from the date of the deceased's death, or, where the duty is payable by instalments, or becomes due at any later date than six months after the death, from the date at which the first instalment or the duty becomes due, and is recoverable in the same manner as if it were part of the duty.

**Interest on fixed duty.**

54. When the fixed duty of 30s. or 50s. under sect. 16 is paid within 12 months after the death of the deceased, interest is not charged. [See sect. 16 (5).]

**Instalments on real property.**

55. The Estate Duty due upon an Account of real property may, at the option of the person delivering the Account, be paid by eight equal yearly instalments or sixteen half-yearly instalments, with interest—see Clause 53—from the date at which the first instalment is due, and the first instalment is to be due at the expiration of twelve months from the death, and the interest on the unpaid portion of the duty is to be added to each instalment and paid accordingly, but the duty for the time being unpaid, with such interest to the date of payment, may be paid at any time, and, in case the property is sold, is to be paid on completion of the sale, and if not so paid, is to be duty in arrear. On a conveyance of a legal estate in land in England and Wales by way of exchange or legal mortgage, any outstanding instalments of Estate Duty, in respect of the land dealt with, are similarly at once payable. [See Finance Act, 1894, sect. 6 (8), Law of Property Act, 1925, sect. 17 (3), and Land Registration Act, 1925, sect. 73 (6).]

**Power to transfer land in satisfaction of duty.**

56. The Commissioners may, if they think fit, on the application of any person liable to pay Estate Duty or Settlement Estate Duty in respect of any real (including leasehold) property, passing on a death occurring on or after the 30th April, 1909, accept in satisfaction of the whole or any part of such duties, such part of the property as may be agreed upon between the Commissioners and that person. [See Finance (1909-10) Act, 1910, sect. 56 (1).]

**Instalments on annuities.**

57. The Estate Duty in respect of any annuity or other definite annual sum referred to in sect. 2 (1) (d) of the Finance Act, 1894, may be paid by four equal yearly instalments, the first to be due 12 months after the death.

Interest on the whole unpaid duty is to be added to the second and subsequent instalments. [See Finance Act, 1896, sect. 16.]

58. (i) In the case of property situate in a British possession, and passing on the death of a person dying domiciled in Great Britain, if any duty in respect thereof is payable in the British possession, a sum equal to the amount of that duty is to be deducted from the Estate Duty payable in respect of that property on the same death; but only where by the law of such possession either no duty is chargeable in respect of property situate in Great Britain when passing on death, or a like allowance as against the duty chargeable in such possession is made in respect of any duty payable in Great Britain. This provision only applies to such British possessions as are from time to time brought within its scope by Order in Council. [See sect. 20.]

Deduction of duty paid out of Great Britain.

(ii) The section is operative in regard to the following possessions: Alberta, Australia (Commonwealth), Australia (South), Australia (Western), Bahamas, Barbados, Bermudas, British Columbia, British Guiana, Ceylon, Falkland Islands, Fiji, Gambia, Gibraltar, Gold Coast, Grenada, Hong Kong, India (not including the Feudatory Native States), Jamaica, Leeward Islands, Malay States, Manitoba, Mauritius, New Brunswick, Newfoundland, New South Wales, New Zealand, Nigeria, Nova Scotia, Ontario, Papua, Quebec, Saint Lucia, Saskatchewan, Sierra Leone, Straits Settlements, Tasmania, Trinidad and Tobago, and Victoria.

(iii) Under the Foreign Jurisdiction Act, 1913, the section is also operative in regard to: East Africa Protectorate (now Kenya), Gambia Protectorate, Nyasaland Protectorate, Southern Rhodesia, Swaziland, Uganda Protectorate, Zanzibar.

(iv) In the case of deaths since the 21st November, 1921, where Estate Duty is payable in Northern Ireland in respect of property there situate an allowance may be claimed of a sum equal to the amount of that duty against the Estate Duty payable in Great Britain in respect of that property on the same death. [See Government of Ireland Act, 1920, sect. 28.]

(v) Where Estate Duty is payable in the Irish Free State by reason of a death of a person dying on or after the 1st April, 1923, in respect of any property situate in the Irish Free State and passing on such death, a sum equal to the amount of that duty is allowed to be deducted from the Estate Duty payable in Great Britain in respect of that property on the same death. [See Irish Free State (Consequential Provisions) Act, 1922, sect. 5, and Part II of the schedule to the Relief in respect of Double Taxation (Irish Free State) Declaration, 1923.]

59. (i) Deduction against the Estate Duty payable on a death, on or after the 1st July, 1896, in respect of settled property, may be taken in respect of any of the following duties, which, prior to the 2nd August, 1894, had been

Deduction in respect of prior duties.

paid, or were payable, under the settlement upon the capital of the property in respect of which the Estate Duty is payable, viz.: the additional Succession Duties under sect. 21 of the Customs and Inland Revenue Act, 1888, the temporary Estate Duties under sects. 5 & 6 of the Customs and Inland Revenue Act, 1889, and the one per cent Legacy and Succession Duties. [See Finance Act, 1896, sect. 21.] But sect. 15 of the Finance Act, 1907, enacts that the deduction, instead of being the amount of the duty paid or payable, is to be the amount which would have been payable on account of the duty if the duty were calculated on the value of the property on which Estate Duty is payable; provided that, if as respects any such deduction the person by whom the duty is payable requires the Commissioners, *on the first delivery of his account*, to calculate the deduction as if this section had not passed, the deduction is to be so calculated.

Allowance of Settlement Estate Duty paid.  
Payment of interest on Settlement Estate duty to representatives of life tenants.

(ii) On the first occasion on which Estate Duty becomes payable upon a death since 15th August, 1914, in respect of any property—which duty would not have been payable but for the abolition of Settlement Estate Duty and of relief in respect of settled property—any Settlement Estate Duty which has been paid in respect of that property is to be allowed against the amount of Estate Duty payable on that occasion, and if it exceeds that amount, the excess is to be repaid to the estate; and, in addition, a sum equal to simple interest on the amount of the Settlement Estate Duty, calculated from the 15th August, 1914, up to the date of the occasion is to be paid, according to their respective interests, to the several persons or their representatives who would have been entitled to the income arising from that amount, if on the 15th August, 1914, it had been added to the capital of the settled property. [See Finance Act, 1914, sect. 14 (b).]

MISCELLANEOUS.  
Executor to disclose estate.

60. The executor of the deceased is, to the best of his knowledge and belief, to specify in appropriate accounts annexed to the Inland Revenue Affidavit *all* the property in respect of which Estate Duty is payable upon the death of the deceased, whether he is or is not accountable for the duty thereon. [See sect. 3 (3).]

Production of books, &c.

61. Accounts and statements are to be verified on oath, and by production of all necessary books and documents. [See sect. 8 (14).]

Power of Commissioners to call for accounts.

62. Every person accountable for Estate Duty, and every person whom the Commissioners believe to have taken possession of or administered any part of the estate of the deceased or of the income thereof, is, to the best of his knowledge and belief, if required by the Commissioners, to deliver to them and verify a statement of such particulars, and evidence as they require, relating to any property which they have reason to believe to form part of an estate, in respect of which Estate Duty is leviable on the death of the deceased. [See sect. 8 (5).]

Penalties.

63. Penalties are provided for the wilful failure to deliver accounts or to comply with the requirements which the

Commissioners are empowered to make. [See sect. 8 (6) and (14).]

64. (i) In the case of persons dying on or after the 2nd August, 1894, and before the 19th April, 1907, the rates of Estate Duty are according to the following scale. [See sect. 17.]

RATES OF  
ESTATE  
DUTY.

Principal Value of the Estate				Rate per cent
£		£		£
Exceeds	100	Does not exceed	100	0
"	500	" " "	500	1
"	1,000	" " "	1,000	2
"	10,000	" " "	10,000	3
"	25,000	" " "	25,000	4
"	50,000	" " "	50,000	4½
"	75,000	" " "	75,000	5
"	100,000	" " "	100,000	5½
"	150,000	" " "	150,000	6
"	250,000	" " "	250,000	6½
"	500,000	" " "	500,000	7
"	1,000,000	" " "	1,000,000	7½
"	.	" " "	.	8

(ii) In the case of settled property passing on a death on or after the 9th April, 1900, and before the 19th April, 1907, where the disposer died on or before the 1st August, 1894, and such property, if he had died after that date, would have been chargeable with Estate Duty on his death, the aggregation to a limited extent, referred to in clause 25 (iii) above, may result in the rates of duty on the settled property, treated as an estate by itself, and on property aggregable therewith, being raised one-half per cent, except in the case of the 8 per cent rate.

(iii) In the case of persons dying on or after the 19th April, 1907, and before the 30th April, 1909, the rates of Estate Duty are according to the following scale. [See Finance Act, 1907, sect. 12, and the First Schedule to that Act.]

Principal Value of the Estate				Rate per cent
£		£		£
(Up to £150,000 as before)				
Exceeds	150,000	and does not exceed	250,000	7
"	250,000	" "	500,000	8
"	500,000	" "	750,000	9
"	750,000	" "	1,000,000	10
"	1,000,000	" "	1,500,000	£10 on 1 million and £11 on the remainder
"	1,500,000	" "	2,000,000	£10 on 1 million and £12 on the remainder
"	2,000,000	" "	2,500,000	£10 on 1 million and £13 on the remainder
"	2,500,000	" "	3,000,000	£10 on 1 million and £14 on the remainder
"	3,000,000	.	.	£10 on 1 million and £15 on the remainder

## PROBATE PRACTICE

(iv) In the case of persons dying on or after the 30th April, 1909, and before the 16th August, 1914, the rates of Estate Duty are according to the following scale. [See Finance (1909-10) Act, 1910, sect. 54, and the Second Schedule to that Act.]

Principal Value of the Estate		Rate per cent
£	£	£
(Up to £1,000 as before)		
Exceeds 1,000 and does not exceed 5,000	5,000	3
" 5,000 " " "	10,000	4
" 10,000 " " "	20,000	5
" 20,000 " " "	40,000	6
" 40,000 " " "	70,000	7
" 70,000 " " "	100,000	8
" 100,000 " " "	150,000	9
" 150,000 " " "	200,000	10
" 200,000 " " "	400,000	11
" 400,000 " " "	600,000	12
" 600,000 " " "	800,000	13
" 800,000 " " "	1,000,000	14
" 1,000,000 . . . . .	.	15

(v) In the case of persons dying on or after the 16th August, 1914, and before the 31st July, 1919 the rates of Estate Duty are according to the following scale. [See Finance Act, 1914, sect. 12, and the First Schedule to that Act.] The values below which sect. 13 (1) of the Finance Act, 1914, comes into operation are also shown. [See Clause 66 (iv).]

Principal Value of the Estate		Rate per cent	Values below which s. 13 (1) of the Finance Act, 1914, comes into operation		
£	£	£	£	s.	d.
Does not exceed 100	100	0			
Exceeds—					
100 and does not exceed 500	500	1	101	0	3
500 " " "	1,000	2	505	2	1
1,000 " " "	5,000	3	1,010	6	3
5,000 " " "	10,000	4	5,052	1	8
10,000 " " "	20,000	5	10,105	5	4
20,000 " " "	40,000	6	20,212	15	4
40,000 " " "	60,000	7	40,430	2	2
60,000 " " "	80,000	8	60,652	3	6
80,000 " " "	100,000	9	80,879	2	6
100,000 " " "	150,000	10	101,111	2	3
150,000 " " "	200,000	11	151,685	7	11
200,000 " " "	250,000	12	202,272	14	7
250,000 " " "	300,000	13	252,873	11	4
300,000 " " "	350,000	14	303,488	7	6
350,000 " " "	400,000	15	354,117	13	0
400,000 " " "	500,000	16	404,761	18	2
500,000 " " "	600,000	17	506,024	2	0
600,000 " " "	800,000	18	607,317	1	6
800,000 " " "	1,000,000	19	809,876	10	11
1,000,000 . . . . .	.	20	1,012,500	0	0

(vi) In the case of persons dying on or after the 31st July, 1919, and before the 30th June, 1925, the rates of Estate Duty are according to the following scale. [See Finance Act, 1919, sect. 29, and the Third Schedule to that Act.]

Principal Value of the Estate		Rate per cent	Values below which s. 13 (1) of the Finance Act, 1914, comes into operation		
£	£	£	£	s.	d.
(Up to £10,000 as before)					
Exceeds—					
10,000 and does not exceed	15,000	5	10,105	5	4
15,000	20,000	6	15,159	11	6
20,000	25,000	7	20,215	1	1
25,000	30,000	8	25,271	14	9
30,000	40,000	9	30,329	13	2
40,000	50,000	10	40,444	8	11
50,000	60,000	11	50,561	16	0
60,000	70,000	12	60,681	16	5
70,000	90,000	13	70,804	12	0
90,000	110,000	14	91,046	10	3
110,000	130,000	15	111,294	2	5
130,000	150,000	16	131,547	12	5
150,000	175,000	17	151,807	4	7
175,000	200,000	18	177,134	3	0
200,000	225,000	19	202,469	2	9
225,000	250,000	20	227,812	10	0
250,000	300,000	21	253,164	11	2
300,000	350,000	22	303,846	3	1
350,000	400,000	23	354,545	9	2
400,000	450,000	24	405,263	3	2
450,000	500,000	25	456,000	0	0
500,000	600,000	26	506,756	15	2
600,000	800,000	27	608,219	3	7
800,000	1,000,000	28	811,111	2	3
1,000,000	1,250,000	30	1,028,571	8	7
1,250,000	1,500,000	32	1,286,764	14	2
1,500,000	2,000,000	35	1,569,230	15	5
2,000,000		40	2,166,666	13	4



(vii) In the case of persons dying on or after the 30th June, 1925, and before the 1st August, 1930, the rates of Estate Duty are according to the following scale. [See Finance Act, 1925, sect. 22, and the Fourth Schedule to that Act.]

Principal Value of the Estate		Rate per cent	Values below which s. 13 (1) of the Finance Act, 1914, comes into operation	
£	£	£	£	s. d.
(Up to £10,000 as before)				
Exceeds—				
10,000 and does not exceed	12,500	5	10,105	5 4
12,500     "     "     "	15,000	6	12,632	19 7
15,000     "     "     "	18,000	7	15,161	5 10
18,000     "     "     "	21,000	8	18,195	13 1
21,000     "     "     "	25,000	9	21,230	15 5
25,000     "     "     "	30,000	10	25,277	15 7
30,000     "     "     "	35,000	11	30,337	1 7
35,000     "     "     "	40,000	12	35,397	14 7
40,000     "     "     "	45,000	13	40,459	15 5
45,000     "     "     "	50,000	14	45,523	5 2
50,000     "     "     "	55,000	15	50,588	4 9
55,000     "     "     "	65,000	16	55,654	15 3
65,000     "     "     "	75,000	17	65,783	2 8
75,000     "     "     "	85,000	18	75,914	12 9
85,000     "     "     "	100,000	19	86,049	7 8
100,000     "     "     "	120,000	20	101,250	0 0
120,000     "     "     "	140,000	21	121,518	19 9
140,000     "     "     "	170,000	22	141,794	17 6
170,000     "     "     "	200,000	23	172,207	15 11
200,000     "     "     "	250,000	24	202,631	11 7
250,000     "     "     "	325,000	25	253,333	6 8
325,000     "     "     "	400,000	26	329,391	17 11
400,000     "     "     "	500,000	27	405,479	9 1
500,000     "     "     "	750,000	28	506,944	8 11
750,000     "     "     "	1,000,000	29	760,563	7 8
1,000,000     "     "     "	1,250,000	30	1,014,285	14 4
1,250,000     "     "     "	1,500,000	32	1,286,764	14 2
1,500,000     "     "     "	2,000,000	35	1,569,230	15 5
2,000,000     "     "     "		40	2,166,666	13 4

(viii) In the case of persons dying on or after the 1st August, 1930, the rates of Estate Duty are according to the following scale. [See Finance Act, 1930, sect. 33, and the Second Schedule to that Act.]

Principal Value of the Estate	Rate per cent	Values below which s. 13 (1) of the Finance Act, 1914, comes into operation
£	£	£ s. d.
(Up to £120,000 as before)		
Exceeds—		
120,000 and does not exceed 150,000	22	123,076 18 6
150,000 " " " 200,000	24	153,947 7 5
200,000 " " " 250,000	26	205,405 8 2
250,000 " " " 300,000	28	256,944 8 11
300,000 " " " 400,000	30	308,571 8 7
400,000 " " " 500,000	32	411,764 14 2
500,000 " " " 600,000	34	515,151 10 4
600,000 " " " 800,000	36	618,750 0 0
800,000 " " " 1,000,000	38	825,806 9 1
1,000,000 " " " 1,250,000	40	1,033,333 6 8
1,250,000 " " " 1,500,000	42	1,293,103 9 0
1,500,000 " " " 2,000,000	45	1,581,818 3 8
2,000,000 " " " "	50	2,200,000 0 0

65. (i) The rate of Settlement Estate Duty leviable in respect of "settled property" is one per cent where the deceased died after the 1st August, 1894, and before the 30th April, 1909. [See sect. 17.]

Rates of Settlement Estate Duty.

(ii) In the case of persons dying on or after the 30th April, 1909, and before the 12th May, 1914, the rate is two per cent. [See Finance (1909-10) Act, 1910, sect. 54, and Finance Act, 1914, sect. 14.]

66. In ascertaining the value of an estate, whether an aggregated "one estate" or an "estate by itself," as the case may be, for the purpose of determining under sect. 4 of the Finance Act, 1894, the rate of Estate Duty chargeable, and the principal value upon which the duty at such rate is to be charged, the following adjustments are, WHERE THE DECEASED DIED BEFORE THE 9TH APRIL, 1900, to be made—

(i) *Where the deceased died BEFORE the 1st July, 1896—*  
Any fraction of £10, in excess of £10, or of any multiple thereof, in the aggregated "one estate" or "estate by itself," as the case may be, is to be increased to £10. [See sect. 17.] So that an estate of £10,099 would be treated as £10,100, and the rate of duty would be 4 per cent, and the amount £404. An estate of £199 would be treated as £200, and would pay £2.

Fractions of £100 capital.

(ii) *Where the deceased died ON OR AFTER the 1st July, 1896, but before the 9th April, 1900—*

Any fraction of £100 in excess of £100, or of any multiple thereof, in the aggregated "one estate" or "estate by itself," as the case may be, is to be disregarded, except that where the principal value of the estate exceeds £100,

but does not exceed £200, the Estate Duty is to be £1. [See Finance Act, 1896, sect. 17.] So that an estate of £10,099 would be treated as £10,000 and the Estate Duty would be at 3 per cent, and would amount to £300. An estate of £10,100 would, however, be treated as £10,100, and the rate of duty would be 4 per cent, and the amount £404. An estate of £199 would by this rule be treated as £100, but it does not thereby acquire exemption from Estate Duty as *not exceeding* £100, but pays £1 as stated above.

(iii) WHERE, HOWEVER, THE DECEASED DIED ON OR AFTER THE 9TH APRIL, 1900, the Estate Duty is, subject to the exception referred to in the next paragraph, *post*, to be levied on the exact net principal value of the estate, both as regards rate and amount of duty, without the exclusion of any fraction of that value. [See Finance Act, 1900, sect. 13 (1).]

Reduction of full amount of duty where the margin above the limit of value is small.

(iv) The amount of Estate Duty payable on an estate at the rate applicable thereto under the scale of rates of duty is, where necessary, to be reduced so as not to exceed the highest amount of duty which would be payable at the next lower rate, with the addition of the amount by which the value of the estate exceeds the value on which the highest amount of duty would be so payable at the lower rate. [See Finance Act, 1914, sect. 13 (1).] Where, e.g. the net principal value of an estate is £10,001, the duty will be £401 [ $4\%$  on £10,000 = £400 + £1.] [See Clauses 64 (v), (vi), (vii) and (viii) for the values below which this provision comes into operation.]

Relief in respect of quick succession where property consists of land or a business.

(v) Where the Commissioners of Inland Revenue are satisfied that Estate Duty has become payable on any property consisting of land or a business (not being a business carried on by a company) or any interest in land or such a business passing upon the death of any person, and that subsequently within 5 years Estate Duty has again become payable on the same property or any part thereof passing on the death of the person to whom the property passed on the first death, the amount of Estate Duty payable on the second death (if that death occurs on or after the 31st July, 1914) in respect of the property so passing shall be reduced as follows—

Where the second death occurs within one year of the first death, by fifty per cent;

Where the second death occurs within two years of the first death, by forty per cent;

Where the second death occurs within three years of the first death, by thirty per cent;

Where the second death occurs within four years of the first death, by twenty per cent;

Where the second death occurs within five years of the first death, by ten per cent;

Provided that where the value, on which the duty is payable, of the property on the second death exceeds the value, on which the duty was payable, of the property on the first death, the latter value shall be substituted

for the former for the purpose of calculating the amount of duty on which the reduction under this section is to be calculated. [See Finance Act, 1914, sect. 15.]

Before any deduction under this section can be allowed it will be necessary to satisfy the Commissioners of Inland Revenue that the requirements of the section have been complied with. Particulars of the property in respect of which the deduction is claimed together with the full name and exact date of death of the person upon whose decease the earlier payment of duty was made should be stated in a schedule to be annexed to the Inland Revenue Affidavit.

The matter can be more conveniently dealt with if application for repayment is made after the grant of representation to the deceased has been obtained.

67. Where the GROSS value of the property real and personal on which Estate Duty is payable on the death of the deceased exclusive of property settled otherwise than by the will of the deceased exceeds £100, but does not exceed £300, a fixed duty of 30s. *may be* paid, and where it exceeds £300 but does not exceed £500, a fixed duty of 50s. *may be* paid. [See sect. 16 (1).] Provided that where any property passing on a death occurring on or after the 29th April, 1910, is proved to the satisfaction of the Commissioners to be subject to a charge created for the purpose of securing unpaid purchase money, or money borrowed to pay purchase money, or to be subject to or liable to be made subject to a charge for securing an advance obtained for the purchase thereof, the GROSS value of such property for the purpose of this sub-section is the principal value after deducting any such charge or liability to which the property is so subject. [See Finance (1909-10) Act, 1910, sect. 61 (2).] Where the fixed duty of 30s. or 50s. has been paid, and it is afterwards discovered that the gross value of the property exceeds £500, the *ad valorem* duty according to the true value is payable, but if the Commissioners are satisfied that there were reasonable grounds for the original estimate of the value of the property, an allowance may be made for the duty paid at first. [See Revenue Act, 1903, sect. 14.] Where, however, the deceased died prior to the 1st September, 1903, no such allowance can be made, save that where 30s. has been paid instead of 50s. the difference only is payable.

68. Where, in connection with the death of a person dying on or after the 30th April, 1909, it is necessary to determine the gross or net value of any "agricultural property" for the purpose of sect. 16 of the Finance Act, 1894, the principal value of such property where no part of the value is due to the expectation of an increased income from the property is not to exceed 25 times the annual value, as assessed under Schedule A of the Income Tax Acts, after making such deductions as have not been allowed in that assessment, and are allowed under the Succession Duty Act, 1853, and making a deduction for expenses of management not exceeding 5 per cent of the

Estates not  
above £500  
gross.

Value of  
agricultural  
property in  
small estates.  
[See also  
Clauses 37  
and 69.]

annual value so assessed. [See sect. 61 (1) of the Finance (1909-10) Act, 1910, incorporating the proviso to sect. 7 (5) of the Finance Act, 1894.]

Definition of agricultural property.

69. The expression "agricultural property," means agricultural land, pastures and woodland, and also includes such cottages, farm buildings, farm houses, and mansion houses (together with the lands occupied therewith) as are of a character appropriate to the property. [See sect. 22 (1) (g).]

Option.

70. The *ad valorem* duty according to the scale may be paid instead of the fixed duty of 30s. or 50s. [See sect. 16 (1) and sect. 16 (2), embodying and extending the Customs and Inland Revenue Act, 1881, sect. 33.] If the net estate is small it may be found that the *ad valorem* duty is less in amount than the fixed duty, but the amounts of the fees payable to the Probate Court are not the same in both cases and should also be considered.

EXEMPTION FROM CERTAIN DUTIES.

In cases not over £1,000 net.

[See also Clauses 26, 67 and 68.]

71. Where the NET value of the property, real and personal, in respect of which Estate Duty is payable on the death of the deceased, exclusive of property settled otherwise than by the will, if any, of the deceased, does not exceed £1,000, and the fixed duty or *ad valorem* Estate Duty has been paid upon the principal value of that estate, Legacy and Succession Duties are not payable under the will or intestacy of the deceased in respect of that estate. [See sect. 16 (3).]

72. The Forms in use in England are—

AFFIDAVITS—

FORMS IN USE.

B—2. Inland Revenue Affidavit for Probate or Administration where there is *no* settled property, and the gross principal value of the free and other unsettled property, real and personal (including property over which the deceased had and exercised by will a general power of appointment, and property which by default of exercise of the power of appointment belonged to the deceased absolutely), passing on the death of the deceased does not exceed £500 (except where the *gross* value exceeds £100, but the *net* value does not exceed £100), and, if any Estate Duty is payable thereon, it is desired to pay the fixed duty of 30s. or 50s.

NOTE.—Where, in the circumstances of the case, the *ad valorem* duty in respect of the *net* estate is less than the fixed duty [see Clause 70], and it is desired to pay the smaller duty, the Form A—4, or A—6, whichever is appropriate, should be used, and not the Form B—2.

B—3. Inland Revenue Affidavit for Probate or Administration, similar to B—2, but to be used *where the deceased died after the 1st August, 1894 and, prior to the 19th April, 1907*, and where there is settled property (not being property over which the deceased had and exercised by will a general power of appointment or property

which, by default of exercise of the power of appointment, belonged to the deceased absolutely), in addition.

No. 24. Summary of Duty and Interest: To accompany Form B—3.

B—4. Inland Revenue Affidavit for Probate or Administration, similar to B—3, but to be used *where the deceased died on or after the 19th April, 1907.*

No. 27. Summary of Duty and Interest: To accompany Form B—4.

A—4. Inland Revenue Affidavit for Probate or Administration, where the property passing on the death of the deceased consists exclusively of free personal property situate in Great Britain, passing under the deceased's will or intestacy and or personal property over which the deceased had and exercised by will a general power of appointment; except where the net value exceeds £100, but the *gross* value does not exceed £500, and the fixed duty of 30s. or 50s. is to be paid.

No. 16. Summary of Duty and Interest: To accompany Form A—4.

A—6. Inland Revenue Affidavit for Probate or Administration, where the property passing on the death of the deceased consists exclusively of free personal and real property situate in Great Britain, passing under the deceased's will or intestacy and (or) personal and real property over which the deceased had and exercised by will a general power of appointment; except where the net value exceeds £100, but the *gross* value does not exceed £500, and the fixed duty of 30s. or 50s. is to be paid.

No. 17. Summary of Duty and Interest: To accompany Form A—6.

A—5. Inland Revenue Affidavit for a grant of double probate, a grant *de bonis non*, or a cessate grant.

A—3. Inland Revenue Affidavit for Probate or Administration, *where the deceased died after the 1st August, 1894, and prior to the 19th April, 1907*, except where B—2, B—3, A—4, A—6, or A—5 is applicable.

No. 15. Summary of Duty and Interest: To accompany Form A—3.

A—7. Inland Revenue Affidavit for Probate or Administration, *where the deceased died on or after the 19th April, 1907*, except where B—2, B—4, A—4, A—6, A—5, or Y—1, is applicable.

No. 28. Summary of Duty and Interest: To accompany Form A—7.

Y—1. Inland Revenue Affidavit for Probate or Administration, where the deceased died domiciled outside Great Britain and no property situate in Great Britain passed at the death, but a

grant is required in respect of assets since transmitted to this country.

D—1. (In duplicate.) Corrective Affidavit.

#### ACCOUNTS—

C—1. (In duplicate.) Account of property which passed on the death, but the Estate Duty whereon was not paid on the Inland Revenue Affidavit.

C—2. (In duplicate.) Account for Settlement Estate Duty.

C—3. Account for instalments of Estate Duty and Settlement Estate Duty.

D—2. (In duplicate.) Corrective Account.

For particulars as to the forms in use in Scotland, application should be made to the Registrar, Estate Duty Office, Inland Revenue, Edinburgh.

Where forms obtainable.

73. All the English forms can be obtained upon application to the Controller, Estate Duty Office, Inland Revenue, Somerset House, London, W.C.2.

74. All the English forms referred to above, except B—3, A—3, A—5, Y—1 and C—2 can be obtained at English Head Post Offices outside the Metropolitan Postal District, and at the Throgmorton Avenue Post Office, London Wall, E.C.2.

Deaths on or before 1st August, 1894.

75. Where a person died on or before the 1st August, 1894, duties in force immediately prior to the commencement of the Finance Act, 1894, continue to be payable [see sect. 21 (2)], and the above forms are not applicable. The English forms which are appropriate in such circumstances are shown in the Official Form, No. 18, which is obtainable as stated in Clause No. 73.

DELIVERY OF AFFIDAVITS AND ACCOUNTS AND PAYMENT OF DUTIES.

76. The Inland Revenue Affidavit is to be delivered to the Probate Registrar on application for Probate or Administration.

77. The payment of Estate Duty on Inland Revenue Affidavits for Probate &c., may be made in England in any of the following ways—

(i) Personally in Room 25, Accountant-General's Office, Inland Revenue, Somerset House, London, W.C.2, after a formal assessment of the amount payable has been made in the Estate Duty Office, Inland Revenue, Somerset House.

(ii) Through the post to the Accountant-General (Cashier), Inland Revenue, Somerset House, London, W.C.2—

(A) By cheque drawn in favour of the "Commissioners of Inland Revenue, Death Duties, re..... deceased, or Bearer" and crossed "Bank of England—Inland Revenue."

(B) Where the duty does not exceed £40, by Money Order (which can be obtained free of commission) drawn in favour of the "Commissioners of Inland Revenue, Death Duties, re..... deceased, or Bearer" and crossed "Bank of England—Inland Revenue." These money Orders can be obtained on

production of the Affidavit at any Money Order Post Office. Postmasters are restricted, in the receipt of Estate Duty, to the issue of Money Orders; they may not otherwise receive the duty, nor may they accept Affidavits for the purpose of having them stamped.

In every case the Affidavit *and* Warrant must accompany the payment.

Where payment of the fixed duty of 30s. or 50s. is made (see paragraphs 67 and 70), the appropriate Estate Duty stamp must be used and affixed to the first page of the Affidavit.

78. Accounts and Corrective Affidavits should be transmitted to the Controller, Estate Duty Office, Inland Revenue, Somerset House, London, W.C.2. In suitable cases an appointment will be arranged. The Accounts and Corrective Affidavits will be examined, and any instructions which may be necessary will be issued. *Where duty is to be returned* the Corrective Affidavit or Account should be accompanied by evidence in support of the claim. In Corrective Affidavit cases, the Probate or Letters of Administration should be forwarded, and in Corrective Account cases where a return of duty is claimed, the original stamped account should be sent.

79. For particulars as to the method of payment of Estate Duty, and of the delivery of accounts, in Scotland, application should be made to the Registrar, Estate Duty Office, Inland Revenue, Edinburgh.

80. The Commissioners may, if they think fit, dispense with an oath in corrections of Estate Duty. [See Finance Act, 1900, sect. 13 (2).] Where duty is *to be paid*, the Corrective Affidavit or Corrective Account may, if desired, be transmitted unsworn in the first instance.





# APPENDIX II

## NON-CONTENTIOUS PROBATE RULES

*Made pursuant to the Court of Probate Act, 1857, the Court of Probate Act, 1858, the Colonial Probates Act, 1892, the Finance Act, 1894, the Administration of Estates Act, 1925, the Administration of Justice Act, 1925, and the Supreme Court of Judicature (Consolidation) Act, 1925.*

NON-CONTENTIOUS BUSINESS SHALL INCLUDE ALL COMMON FORM  
BUSINESS AS DEFINED BY THE COURT OF PROBATE ACT,  
1857, AND THE WARNING OF CAVEATS

### *Principal Registry*

1. Application for probate or letters of administration may be made at the principal registry in all cases.
2. Such applications may be made through a proctor, solicitor, or attorney, or in person by executors and parties entitled to grants of administration; but these latter applications will not be received by letter, nor through the medium of any agent.
3. The registrars are not to allow probate or letters of administration to issue until all the enquiries which they may see fit to institute have been answered to their satisfaction. The registrars, are, notwithstanding, to afford as great facility for the obtaining grants of probate or administration as is consistent with a due regard to the prevention of error or fraud.

### *District Registries*

1. Application for probate or letters of administration may be made at the principal registry in all cases. Application may also be made at a district registry in cases where the deceased, at the time of his death, had a fixed place of abode within the district in which his application is made, and not otherwise.\*
2. Such applications may be made through a proctor, solicitor, or attorney, or in person by executors and persons entitled to grants of administration.
3. The district registrar, before he entertains any application for probate or letters of administration, must ascertain that the deceased had, at the time of his death, a fixed place of abode within the district.\*
4. The district registrar is not to allow probate or letters of administration to issue until all the enquiries which he may see fit to institute have been answered to his satisfaction, and this refers more

\* The territorial limits were abolished as from 1st January, 1926.

particularly to applications made in person by executors and others. The district registrar is notwithstanding to afford as great facility for the obtaining grants of probate or administration as is consistent with a true regard to the prevention of error or fraud.

5. No district registrar or clerk in a district registry shall directly or indirectly transact business for himself or as a proctor or solicitor of any other person in the district registry to which he has been appointed.

*As to Probate of Wills and Letters of Administration with the Will or Will and Codicils annexed, where the Wills and Codicils are dated after 31st December, 1837*

#### *Execution of a Will*

4. If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause there-to be insufficient, the registrars must require an affidavit from at least one of the subscribing witnesses, if they or either of them be living to prove that the provisions of 7 Will. 4 and 1 Vict. c. 26, s. 9 and 15 & 16 Vict. c. 24, in reference to the execution, were in fact complied with.
- 4(A). The practice of registering affidavits shall be discontinued, and, in lieu thereof, a note signed by a registrar shall be inserted on the engrossed copy will or codicil annexed to the probate or letters of administration, and registered, to the effect that affidavits of due execution, of domicile, or as the case may be, have been filed; Provided that in cases presenting difficulty the affidavits themselves

#### *Execution of a Will*

6. Upon receiving an application for probate or letters of administration with the will annexed, the district registrar must inspect the will and each codicil, and see whether by the terms of the attestation clause (if any) it is shown that the same have been executed in accordance with the provisions of statutes 7 Will. 4 & 1 Vict. c. 26, and 15 & 16 Vict. c. 24.
7. See Principal Registry Rule 4.
- 7(A). Same as Principal Registry Rule 4(A) down to the word "filed." Then add "Provided that in cases presenting difficulty the affidavits themselves may be registered with the consent of a registrar of the principal registry."
8. See Principal Registry Rule 5.
9. If on perusing the affidavit or affidavits setting forth the facts of the case, it appear doubtful whether the will or codicil has been duly executed, the district registrar

may still be registered by direction of a registrar.

5. If on perusing the affidavits of both the subscribing witnesses it appear that the requirements of the statutes were not complied with, the registrars must refuse probate.
6. If on perusing the affidavit or affidavits setting forth the facts of the case, it appear doubtful whether the will or codicil has been duly executed, the registrars may require the parties to bring the matter before the judge on motion.
7. If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the will or codicil; but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact and of the handwriting of the deceased and the subscribing witnesses, and also of any circumstances which may raise a presumption in favour of the due execution.

*Interlineations and Alterations*

8. Interlineations and alterations are invalid unless they existed in the will at the time of its execution, or, if made afterwards, unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto.
9. When interlineations or alterations appear in the will (unless duly executed, or recited in, or otherwise

must transmit a statement of the matter to the registrars of the principal registry, who may require the parties to bring the matter before the judge on motion.

10. See Principal Registry Rule 7.

11. See Principal Registry Rule 8

12. See Principal Registry Rule 9.

identified by, the attestation clause) an affidavit or affidavits in proof of their having existed in the will before its execution must be filed, except when the alterations are mainly verbal, or when they are of but small importance and are evidenced by the initials of the attesting witnesses.

*Erasures and Obliterations*

10. Erasures and obliterations are not to prevail unless proved to have existed in the will at the time of its execution, or unless the alterations thereby effected in the will are duly executed and attested, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto. If no satisfactory evidence can be adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated be not entirely effaced, but can upon inspection of the paper be ascertained, they must form part of the probate.
11. In every case of words having been erased or obliterated which might have been of importance, an affidavit must be required.

*Deeds, etc., referred to in a Will*

12. If a will contain a reference to any deed, paper, memorandum, or other document, of such a nature as to raise a question whether it ought or ought not to form a constituent part of the will, the production of such deed, paper, memorandum, or other document must be required, with a view to ascertain whether it is entitled to probate; and, if not produced, its non-pro-

13. See Principal Registry Rule 10.

14. See Principal Registry Rule 11.

15. See Principal Registry Rule 12.

duction must be accounted for.

13. No deed, paper, memorandum, or other document can form part of a will unless it was in existence when the will was executed.

*Appearance of the Paper*

14. If there are any vestiges of sealing wax or wafers or other marks upon the testamentary papers, leading to the inference that a paper, memorandum, or other document has been annexed or attached to the same, they must be satisfactorily accounted for, or the production of such paper, memorandum, or other document must be required, and, if not produced, its non-production must be accounted for.

*Married Woman's Will*

15. In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such will annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate, or letters of administration with will annexed, in such cases shall take the form of ordinary grants of probate or letters of administration with will annexed without any exception or limitation, and issue to an executor or other person authorised in usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next of kin in case of a partial intestacy.

16. See Principal Registry Rule 13.

17. See Principal Registry Rule 14.

18. See Principal Registry Rule 15.

*Codicils*

16. The above rules and orders respecting wills apply equally to codicils.

19. See Principal Registry Rule 16.

*Doubtful Cases*

20. If it be doubtful whether any will or codicil be entitled to probate, or whether any interlineation, alteration, erasure, or obliteration ought to prevail, or whether any deed, paper, memorandum, or other document ought to form part of a will or codicil, or if any doubt arises in consequence of the appearance of the paper, or on any other point, the District Registrar must communicate with the Registrars of the Principal Registry.

*Letters of Administration with Will Annexed*

21. The right of parties to letters of administration with the will annexed, and letters of administration *de bonis non*, depends so entirely upon the circumstances of each particular case, taken in connection with the wording of the will, that no general rules, other than those which have obtained a judicial sanction, can be laid down for the guidance of the District Registrars. Whenever the right of the party applying is at all questionable, a statement of the case, accompanied by a copy of the will, must be transmitted to the Registrars of the Principal Registry, who will advise thereon.

*As to Probate of Wills, Codicils and Testamentary Papers relating to Personalty, and dated before the 1st January, 1838*

*Execution of a Will*

17. It is not necessary that a will, codicil, or testamentary paper dated before 1st January, 1838, should be signed

22. See Principal Registry Rule 17.

- by the testator or attested by witnesses to constitute it a valid disposition of a testator's personal property. Although neither signed by the testator nor attested by witnesses, it may nevertheless be valid; but in such cases the testator's intention that it should operate as his will, codicil or testamentary disposition must be clearly proved by circumstances.
18. A will, codicil, or testamentary paper, signed at the end of it by the testator, and attested by two disinterested witnesses (although there be no clause of attestation), is *prima facie* entitled to probate.
19. In cases where a will, codicil, or testamentary paper is attested by two witnesses, such witnesses are not required to have been present with the testator at the same time. It is sufficient if the testator subscribed his name or made his mark to it in the presence of one attesting witness, or produced it with his name already written or his mark already made, to one attesting witness, and afterwards produced it to the other attesting witness, provided that on each occasion he declared it to be his will, codicil, or testamentary disposition, or otherwise notified his intention that it should operate as such.
20. If the will, codicil, or testamentary paper is signed at the end of it by the testator, but is unattested, and there is nothing to show an intention that it should be attested by witnesses, the affidavit of two disinterested persons, to prove the signature to be of the handwriting
23. See Principal Registry Rule 18.
24. See Principal Registry Rule 19.
25. See Principal Registry Rule 20.



of the testator, will be sufficient to entitle the paper to probate.

21. If the will, codicil, or testamentary paper is signed at the end of it by the testator, and attested by one witness only, and there is nothing to show the testator's intention that it should be attested by a second witness, the affidavit of one disinterested person, to prove the signature to be of the handwriting of the testator, will be sufficient to entitle the paper to probate.
22. The circumstances of a person being named as an executor in the will, codicil, or testamentary paper, or being interested as a legatee, or as the husband or wife of a legatee under such will, codicil, or testamentary paper, rendered him or her incompetent to become an attesting witness to it, so that if the name of the person so interested appears as that of a subscribing witness to the will, codicil, or testamentary paper, the same, so far as regards his or her attestation, must be considered as unattested, and his or her evidence in support thereof will be inadmissible unless he or she shall first release his or her interest thereunder.
23. If an attestation clause, or the word "witnesses," appear written at the foot of the paper, the same being unattested, or if the paper purport on the face of it to be a draft of a will, the copy of a will, or instructions for a will, it must *prima facie* be considered as an incomplete paper, and not, save under special circumstances, entitled to probate.
26. See Principal Registry Rule 21.
27. See Principal Registry Rule 22.
28. See Principal Registry Rule 23.

*Appearance of Paper*

24. Any appearance of an attempted cancellation of a testamentary paper by burning, tearing, obliteration or otherwise, and every circumstance leading to a presumption of abandonment or revocation of such a paper on the part of the testator must be accounted for.

*Alterations and Interlineations*

25. Alterations and interlineations made by the testator, if unattested, are to be proved by the affidavits of two persons as to his handwriting. If the same are in the handwriting of any person other than the testator, it will suffice to prove by affidavit that such alterations and interlineations were known to and approved of by the testator. Proof by affidavit that they existed in the paper at the time it was found in the repositories of the testator recently after his death may, under circumstances, suffice. Alterations and interlineations made since the 31st December, 1837, are subject to the provisions of 7 Will. 4 and 1 Vict. c. 26.

*Deeds, etc., referred to in a Will or Annexed to a Will*

26. With respect to deeds, papers, memoranda, or other documents mentioned in a testamentary paper, or appearing to have been annexed or attached thereto, the foregoing rules, orders and instructions as to wills, bearing date since the 31st December, 1837, will apply.

29. Any appearance of an attempted cancellation of a testamentary paper by burning, tearing, obliteration or otherwise, and every circumstance leading to a presumption of abandonment or revocation of such a paper on the part of the testator must be accounted for or explained by affidavits. In such cases the testamentary paper and the evidence taken in support of it should be transmitted to the Registrars of the Principal Registry.

30. See Principal Registry Rule 25.

31. See Principal Registry Rule 26.

*Re-publication by Codicil*

27. A will made before the 1st January, 1838, is re-published by a subsequent codicil thereto duly executed.

32. See Principal Registry Rule 27.

*As to Letters of Administration**Notice to Other Next of kin*

28. Where administration is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the Registrar may require proof by affidavit or statutory declaration that notice of such application has been given to such other next of kin.

33. The duties of the District Registrar in granting letters of administration are in many respects the same as in cases of probate. In both cases he must ascertain the time and place of the deceased's death, and the value of the property to be covered by the grant, and see that the applicant has been sworn as required by statute 55 Geo. III, c. 184.

34. Where administration is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the District Registrar may require proof by affidavit or statutory declaration that notice of such application has been given to such other next of kin.

*Limited Administrations*

29. Limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the Judge.
30. Save as in the Administration of Estates Act, 1925, expressly provided no person entitled to a general grant in respect of the estate of a deceased person will be permitted to take a limited grant, except under the direction of the Judge.

35. See Principal Registry Rule 29.

36. See Principal Registry Rule 30.

*Administrations under Section 73*

31. Whenever the Court, under s. 73, appoints an administrator other than the person who, prior to the Court of Probate Act, 1857, would have been entitled to the grant, the same is to be made plainly to appear in the oath of the administrator, in the letters of administration and in the administration bond.

*Grants to an Attorney*

32. In the case of a person residing out of England, administration, or administration with the will annexed, may be granted to his attorney, acting under a power of attorney.

*Grants of Administration to Guardians*

33. Grants of administration may be made to guardians of minors and infants for their use and benefit, and elections by minors of their next of kin or next friend, as the case may be, will be required, but proxies accepting such guardianships and assignments of guardians to minors will be dispensed with.
34. In all cases of infants (i.e. under the age of seven years), not having a testamentary guardian or a guardian appointed by the High Court of Chancery a guardian must be assigned by order of the judge, or of one of the Registrars; the Registrar's order is to be founded on an affidavit showing that the proposed guardian is either *de facto* next of kin of the infants, or that their next of kin *de facto* has renounced his or her right to the guardianship, and is

37. See Principal Registry Rule 31.

38. See Principal Registry Rule 32.

39. See Principal Registry Rule 33.

40. See Principal Registry Rule 34, reading after the words "one of the registrars" the words "of the principal Registry."

consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship.

35. Where there are both minors and infants, the guardian elected by the minors may act for the infants without being specially assigned to them by order of the Judge or a Registrar, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the Judge or of a Registrar.
36. In all cases where grants of administration are to be made for the use and benefit of minors or infants, the administrators are to exhibit a declaration on oath of the personal estate and effects of the deceased, except when the effects are sworn under the value of £20, or when the administrators are the guardians appointed by the High Court of Chancery, or other competent Court, or are the testamentary guardians of the minors or infants.

*Administrator's Oath*

37. The oath to lead to a grant of administration or of administration with the will is to be so worded as to clear off all persons having a prior right to the grant, and the grant is to show on the face of it how the prior interests have been cleared off. In all administrations of a special character the recitals in the oath and in the letters of administration must be framed in accordance with the facts of the case.

41. Where there are both minors and infants, the guardian elected by the minors may act for the infants without being specially assigned to them by order of the Judge or a Registrar of the Principal Registry, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the Judge or of a Registrar of the Principal Registry.

42. See Principal Registry Rule 36.

43. See Principal Registry Rule 37.

*Administration Bonds*

38. Administration bonds are to be attested by an officer of the Principal Registry, by a District Registrar, or by a Commissioner or other person now or hereafter to be authorised to administer oaths under 20 & 21 Vict. c. 77 and 21 & 22 Vict. c. 95, but in no case are they to be attested by the proctor, solicitor, attorney or agent of the party who executes them. The signature of the administrator or administratrix to such bonds, if not taken in the Principal Registry, must be attested by the same person who administers the oath to such administrator or administratrix.
39. (i) In all cases of limited or special administration two sureties are to be required to the administration bond (unless the administrator be the husband of the deceased or his representative, in which case but one surety will be required), and the bond is to be given in double the amount of the property to be placed in the possession of or dealt with by the administrator by means of the grant. The alleged value of such property is to be verified by affidavit if required.
- (ii) In all cases of administration, except where these Rules otherwise expressly provide or a registrar otherwise directs, two sureties are to be required to the bond, and where the deceased dies on or after the 1st day of January, 1926, the bond shall be given in double the amount of the property to be placed in the possession of, or dealt with by, the administrator by means of the grant. The alleged value
44. See Principal Registry Rule 38.
45. In ordinary cases two sureties are to be required, but when the property is *bona fide* under the value of £50, one surety only may be taken to the administration bond.
46. See Principal Registry Rule 39.

of such property shall be verified by affidavit if required; the bond shall be in such of the forms annexed to the Rules as is appropriate to the case or such other form as in the special circumstances of the case the registrar may direct.

40. The administration bond is, in all cases of limited or special administrators, to be prepared in the Registry.
41. The Registrars are to take care (as far as possible) that the sureties to administration bonds are responsible persons.

*Justification of Sureties*

42. When any person takes letters of administration in default of the appearance of persons cited, but not personally served with the citation, and when any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he be a committee appointed by the Court of Chancery, a declaration of the personal estate and effects of the deceased must be filed in the Registry, and the sureties to the administration bond must justify.

47. See Principal Registry Rule 40.

48. See Principal Registry Rule 41.

49. See Principal Registry Rule 42.

*General Rules and Orders for the Principal and District Registrars*

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*Last Wills*

50. The District Registrar is not, in any case in which a will apparently duly executed has been produced to him for probate or for administration with the will annexed, to grant probate of any former will, or administration with any former will annexed, or administration to the deceased

*Time of Issuing Grant*

43. No probate, or letters of administration, with the will annexed, shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the Judge, or by order of two of the Registrars.
44. No letters of administration shall issue until after the lapse of fourteen days from the death of the deceased, unless under the direction of the Judge, or by order of two of the Registrars.
45. In every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified by the practitioner to the Registrar. Should the certificate be unsatisfactory, the Registrars are to require such proof of the alleged cause of delay as they may see fit.

*Filling up Grants*

46. All probates or letters of administration issued from the principal registry are to be filled up there.

as having died intestate, without an order of the Judge or of one of the Registrars of the Principal Registry, showing that the last will is not entitled to probate. In the absence of such order the District Registrar is to communicate with the Registrars of the Principal Registry.

51. No probate, or letters of administration, with the will annexed, shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the judge, or by order of one of the Registrars of the Principal Registry.
52. No letters of administration shall issue until after the lapse of fourteen days from the death of the deceased, unless under the direction of the Judge, or by order of one of the Registrars of the Principal Registry.
53. In every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified by the practitioner to the District Registrar. Should the certificate be unsatisfactory or the case be one of personal application, the District Registrar is to require an affidavit, or to communicate with the Registrars of the Principal Registry.

54. Every grant of probate or of letters of administration issued from the District Registry is to be filled up there and any former grant which has been revoked or has ceased is to be cleared off therein.



*Notice of Applications*

55. Notice of applications for grants of probate, or administration, with the will annexed, transmitted by the District Registrar to the Registrars of the Principal Registry, are to contain (in addition to the particulars specified in s. 49 of the Court of Probate Act, 1857), an extract of the words of the will or codicil by which the applicant has been appointed executor, or of the words (if any) upon which he founds his claim to such administration.
56. Notices of application are to set forth the names and interests of all persons who, according to the practice of the Court, would have a prior right to the applicant, and to show how such prior right is cleared off. In case the persons or any of them have renounced, the date of his or her renunciation must be stated. If the applicant claims as the representative of another person, the date and particulars of the grant to him must appear.

*Oaths of Executors and Administrators*

47. The usual oath of administrators, as well as that of executors and administrators with the will, is to be subscribed and sworn by them as an affidavit, and then filed in the Registry.

*Identity of Parties*

48. The registrars may, in cases where they deem it necessary, require proof, in addition to the oath of the executor or administrator, of the identity of the deceased, or of the party applying for the grant.

57. See Principal Registry Rule 47.

58. The draft oaths to lead grants of special or limited probate or administration, with or without the will annexed, are to be transmitted by the district registrar to the registrars of the principal registry, in order to their

*Testamentary Papers to be  
Marked*

49. Every will, copy of a will, or other testamentary paper, to which an executor or administrator with the will is sworn, must be marked by such executor or administrator and by the person before whom he is sworn.

*Renunciations*

50. Except where otherwise provided in these Rules no person who renounces administration (with or without the will) of the estate of a deceased person in one character is to be allowed to take representation to the same deceased in another character.

being settled, and no special or limited grant is to issue until the draft oath to lead the same has been settled by a registrar of the principal registry.

59. See Principal Registry Rule 48.

60. See Principal Registry Rule 49.

61. See Principal Registry Rule 50.

*Revocation and Alteration  
of Grants*

62. Grants of probate or letters of administration can only be revoked by order of the judge or of one of the registrars of the principal registry.
63. No grant of probate or letters of administration is to be altered by a district registrar, without an order of a registrar of the principal registry having been previously obtained. In case the name of the testator or intestate requires alteration, the notice of the application must be renewed, and the alteration ordered is not to be made by the district registrar, until the usual certificate on such notice has been received from the principal registry.

*Affidavits*

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| <p>51. Every affidavit is to be drawn in the first person, and the occupation and true place of abode of every deponent making it is to be inserted therein.</p> <p>52. In every affidavit made by two or more deponents, the names of the several persons making the affidavits shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.</p> <p>53. No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure, shall, without leave of the Court or one of the Registrars, be filed or made use of in any matter depending in the Probate Court or Registry, unless the interlineation or alteration other than by erasure is authenticated by the initials of the officer taking the affidavit; nor in the case of an erasure unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it.</p> <p>54. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the registrar, commissioner, or other authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the person making the same, and that such person seemed perfectly to understand the same, and also made his or</p> | <p>64. See Principal Registry Rule 51.</p> <p>65. See Principal Registry Rule 52.</p> <p>66. See Principal Registry Rule 53.</p> <p>67. See Principal Registry Rule 54.</p> |
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her mark, or wrote his or her signature, in the presence of the registrar, commissioner, or other authority before whom the affidavit was made.

55. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor, solicitor, or attorney, or before a partner or clerk of his proctor, solicitor, or attorney.
56. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting.
57. In every case where an affidavit is made by a subscribing witness to a will or codicil, such subscribing witness shall depose as to the mode in which the said will or codicil was executed and attested.
58. The registrars are not to allow any affidavit to be filed (unless by leave of the Judge) which is not fairly and legibly written, or in which there is any interlineation, the extent of which at the time when the affidavit was sworn is not clearly shown by the initials of the commissioner, or other person before whom it was sworn.
59. Any person intending to oppose the issuing of a grant of probate or letters of administration must, either personally or by his proctor, solicitor, or attorney, enter a caveat in the principal registry, or in a district
68. See Principal Registry Rule 55.
69. See Principal Registry Rule 56.
70. See Principal Registry Rule 57.
71. The district registrars are not to allow any affidavit to be filed (unless with the concurrence of the registrars of the principal registry), which is not fairly and legibly written, or in which there is any interlineation, the extent of which at the time the affidavit was made is not clearly shown by the initials of the commissioner or other person before whom it was sworn.

*Caveats*

59. Any person intending to oppose the issuing of a grant of probate or letters of administration must, either personally or by his proctor, solicitor, or attorney, enter a caveat in the principal registry, or in a district
72. Any person intending to oppose the issuing of a grant of probate or letters of administration must, either personally or by his solicitor, enter a caveat in the principal registry, or in a district registry.

registry; if in the principal registry the person entering the caveat must also insert the name of the deceased in the index to the caveat book.

60. A caveat shall bear date on the day it is entered, and shall remain in force for the space of six months only, and then expire and be of no effect; but caveats may be renewed from time to time.
61. Rescinded.
62. No grant shall be sealed at any time if the registrar has knowledge of an effective caveat.
63. All caveats shall be warned from the principal registry. The warning is to be left at the place mentioned in the caveat as the address of the person who entered it.
64. It shall be sufficient for the warning of a caveat that a registrar send by the public post a warning signed by himself, and directed to the person who entered the caveat, at the address mentioned in it.
65. The warning to a caveat is to state the name and address of the party on whose behalf the same is issued, and if such person claims under a will or codicil, is also to state the date of such will or codicil, and is to contain an address within three miles of the General Post Office, at which any notice requiring service may be left. The form of warning will be supplied in the registry.
66. Before any citation is signed by a registrar, a caveat shall be entered against any grant being made in respect of the estate of the deceased to which such citation relates.
73. See Principal Registry Rule 60.
74. The district registrar, shall, immediately upon a caveat being entered, send a copy thereof to the registrars of the principal registry.
75. If for any reason the seal should not have been placed upon a grant within 48 hours of receipt of the registrar's certificate, a further certificate shall be obtained from the principal registry. No grant shall be sealed at any time if the registrar has knowledge of an effective caveat.
76. Caveats shall be warned from the principal registry only.
77. After a caveat has been entered, the district registrar is not to proceed with the grant of probate or administration to which it relates until it has expired or been subducted, or until he has received notice from the principal registry that the caveat has been warned and no appearance given, or that the contentious proceedings consequent on the caveat have terminated.
78. The further rules in respect to caveats will be found in the Rules, Orders and Instructions for the Registrars of the Principal Registry.

67. In order to clear off a caveat when no appearance has been entered to a warning duly served, an affidavit of the service of the warning, stating the manner of service and an affidavit of search for appearance and of non-appearance, must be filed.

#### *Citations*

68. No citation is to issue under seal of the Court until an affidavit, in verification of the averments it contains, has been filed in the registry.
69. Citations are to be served personally when that can be done. Personal service shall be effected by leaving a true copy of the citation with the party cited, and showing him the original, if required by him so to do.
70. Citations and other instruments which cannot be served personally are to be served by the insertion of the same, or of an abstract thereof, settled and signed by one of the registrars, as an advertisement in such morning and evening London newspapers, and at such intervals as the judge or one of the registrars may direct.

#### *Blind and Illiterate Testators*

71. The registrars are not to allow probate of the will, or administration with the will annexed, of any blind or obviously illiterate or ignorant person, to issue, unless they have previously satisfied themselves that the said will was read over to the testator before its execution, or that the testator had at such time knowledge of its contents.

#### *Citation and Subpoenas*

79. Citations and subpoenas can be issued from the principal registry only, and the rules applicable to them will be found in the Rules, Orders and Instruction for the Registrars of the Principal Registry.
80. No grants are to issue from a district registry after a citation without the production of an office copy of the decree or order of the judge or one of the registrars of the principal registry authorising the same.
81. Same as Principal Registry Rule 71 and add "When such information is not forthcoming the district registrars are to communicate with the registrars of the principal registry."

*Alterations in Grants, etc.*

72. When any alteration is made in a grant of probate or letters of administration which has issued from a district probate registry, or when any such grant is revoked and the volume of the printed calendar containing the entry of the grant has been forwarded to the district registrars, notice of such alteration or revocation is without delay to be forwarded by the registrars of the principal registry to the district probate registrar from whose registry the altered or revoked grant issued.

*Irish Grants*

73. The seal is not to be affixed to any probate or letters of administration granted in Ireland, so as to give operation thereto as if the grant had been made by the Court of Probate in England, unless it appear from a certificate of the Commissioners of Inland Revenue, or their proper officer, that such probate or letters of administration is duly stamped in respect of the personal estate and effects of which the deceased died possessed in England. In respect of letters of administration, the provisions of statute 21 & 22 Vict. c. 95, s. 29, must also be complied with.

*Grants for Property in the United Kingdom*

74. Whenever a grant of probate or of letters of administration is made under statute 21 & 22 Vict. c. 56, for the whole personal estate and effects of a deceased within the United Kingdom, it

82. Whenever the value of the personal estate and effects of a deceased person is re-sworn under a different amount, or any alteration is made in a grant, or a renunciation is filed, notice of such re-swearing, alteration or renunciation is without delay to be forwarded by the district registrar to the registrars of the principal registry, but no fee shall be payable in respect of any such notice.

*Lists of Grants*

83. The lists of grants of probate and administration required to be furnished by the district registrars under s. 51 of the Court of Probate Act, 1857, are to be furnished on the first and every other Thursday in the month, and are to contain the name of the registry in which each grant was made, and the Christian and surname of each testator and intestate.
84. Every such list of grants furnished by the district registrar is to be accompanied by a copy of the record of each grant mentioned in it. The record, besides stating the necessary particulars of the grant to which it refers, is to contain the place and time of death of the testator or intestate; the names and description of each executor or administrator; the date of each grant; and the sum under which the value of the personal estate and effects is sworn, and in cases of administration the names

must appear by the affidavit made for the Inland Revenue Office, that the testator or intestate died domiciled in England, and that he was possessed of personal estate in Scotland, other than that excluded by 23 & 24 Vict. c. 80, and the value of such personal estate must be separately stated in such affidavit. In case any portion of the personal estate be in Ireland, a separate affidavit and schedule must also be filed. Upon all such grants a note or memorandum must also be written and signed by one of the registrars to the effect that the testator or intestate died domiciled in England.

*N.B.* The separate schedule and affidavit mentioned in this Rule is not now necessary.

*Notices to Queen's Proctor*

75. In all cases where application is made for letters of administration (either with or without a will annexed) of the goods of a bastard dying a bachelor or a spinster, or a widower or widow without issue, or of a person dying without known relation, notice of such application is to be given to Her Majesty's Procurator General (or, in case the deceased died domiciled within the Duchy of Lancaster, to the solicitor for the Duchy in London), in order that he may determine whether he will interfere on the part of the Crown, and no grant is to be issued until the officer of the Crown has signified the

and description of the sureties.

85. Within four days from the end of each month each district registrar is to forward to the principal registry a return, arranged alphabetically, of all grants of probate or letters of administration passed at his district registry during the preceding month.
86. See Principal Registry Rule 74.
87. Grants of probate and administration made in Ireland and confirmations granted in Scotland must be taken to the principal registry, to be sealed with the seal of the Court of Probate, in order to the same having force and effect in England.
88. See Principal Registry Rule 75.



course which he thinks proper to take.

76. (i) In the case of persons dying intestate without any known relation, a citation must be issued against the next-of-kin, if any, and all persons having or pretending to have any interest in the personal estate of the deceased, and the service thereof upon them shall be effected as required by Rule 70. Such citation must also be served upon the Queen's Proctor, or upon the solicitor for the Duchy of Lancaster, as the case may require.
- (ii) In the case of a person dying intestate on or after the 1st January, 1926, leaving no known person entitled to share in his estate, a citation must be issued against all persons having, or pretending to have, a right to share in the estate, and the service thereof upon them shall be effected as required by Rule 70. Such citation must also be served upon His Majesty's Procurator-General or upon the solicitor for the Duchy of Lancaster, or upon the solicitor for the Duchy of Cornwall, as the case may require.

#### *Transmission of Papers*

77. After motions have been made before the judge in court, the registrars are, on the application of the parties (unless the judge shall otherwise direct) to transmit to a district registrar the original papers and documents, in order that the grant of probate or administration may be completed in a district registry.
78. Papers and other documents may be transmitted by the registrars of the principal registry to the district regis-

89. See Principal Registry Rule 76.

90. When motions are to be made before the judge in court, with regard to any application for probate or administration at a district registry, the district registrar is to transmit all original papers and documents to the principal registry, and the same, after the directions of the court have been taken, will, on the application of the parties, be returned to the district registrar together with an office copy of the decree of the judge.

trars through the post office. Such letters or packets are to be superscribed with the words "On Her Majesty's Service" and may be registered, if thought necessary.

*Probate Copies of Wills*

79. The registrars are to take care that the copies of wills and affidavits to be annexed to the probates or letters of administration are fairly and properly written, and are to reject those which are otherwise; but it shall not be necessary that such copies be written in the engrossing hand heretofore in use.

*Office Copies*

80. Office copies of wills, and other documents, furnished in the principal registry, will not be collated with the original will or other document, unless specially required. Every copy so required to be examined shall be certified under the hand of one of the registrars of the principal registry, to be an examined copy.
81. The seal of the court is not to be affixed to any office copy of a will, or other document, unless the same has been certified to be an examined copy, provided that a photographic copy of probate or letters of administration may be sealed with the small seal of the court notwithstanding that it has not been so certified.

91. Original papers are also to be forwarded to the principal registry whenever an inspection of them is necessary, in order to enable the registrars to answer the questions submitted to them by the district registrar.

92. Original papers and documents may be transmitted by the district registrars to the registrars of the principal registry through the post office. Such letters or packets are to be superscribed with the words "On Her Majesty's Service" and may be registered, if thought necessary.

93. See Principal Registry Rule 79.

94. See Principal Registry Rule 80.

95. See Principal Registry Rule 81.

*Attendances with Documents*

82. If a will or other document filed in the registry is required to be produced at any place within three miles of the principal registry, application must be made for that purpose not later than the day previously to that named for its production.

83. If a will or other document filed in the registry is required to be produced at any place beyond the above distance, application must be made for that purpose in sufficient time to allow for making and examining a copy of such will or other document to be deposited in its place, and in every case such notice must be given (except by special leave of the judge or registrars) at least 24 hours before the clerk in whose charge the will or other document is to be placed will be required to set off.

86. Any person served with a subpoena to bring in a testamentary paper is at liberty to enter an appearance on payment of the usual fees, if he thinks fit to do so.

*Time Allowed for Appearing to a Warning, Citation or Subpoena*

87. The time fixed by a warning or citation for entering an appearance, or by a subpoena, to bring in a testamentary paper, shall, in all cases be exclusive of Sundays, Christmas Day and Good Friday.

*Bills of Costs*

Rules 88 to 91 deal with the Taxation of Costs.

96. If a will or other document filed in a district registry is required to be produced at any place within three miles of that registry, application must be made for that purpose not later than the day previously to that named for its production.

97. If a will or other document filed in a district registry is required to be produced at any place beyond the above distance, application must be made for that purpose in sufficient time to allow for making and examining a copy of such will or other document to be deposited in its place.

*Doubtful and Difficult Cases*

98. The district registrars are in every case of doubt or difficulty to communicate with the registrars of the principal registry.

Rules 99 and 100 deal with the Taxation of Costs.

*Rules under the Colonial Probates Act*

92. Application to seal a grant of probate or letters of administration or copy thereof under the Colonial Probates Act, 1892, may be made in the principal probate registry by the executor or administrator or the attorney (lawfully authorised for the purpose) of such executor or administrator, either in person or through a solicitor.
93. Such application must be accompanied by an oath of the executor, administrator, or attorney in the form in the Appendix, or as nearly thereto as the circumstances of the case will allow.
94. The registrars are to be satisfied that notice of such application has been duly advertised.
95. On application to seal letters of administration the administrator or his attorney shall give bond (in the form set out in the Appendix) to cover the personal estate of the deceased within the jurisdiction of the court. The same practice as to sureties and amount of penalties in bond is to be observed as on an application for letters of administration.
96. Application by a creditor under s. 2, s.s.3, of the Colonial Probates Act is to be made by summons before one of the registrars, supported by an affidavit setting out particulars of the claim.
97. In every case, and especially when the domicile of the deceased at the time of death as sworn to in the affidavit differs from that suggested by the description in the grant, the registrars may require further evidence as to domicile.
98. If it should appear that the deceased was not at the time of death domiciled within the jurisdiction of the court from which the grant issued, the seal is not to be affixed unless the grant is such as would have been made by the High Court of Justice in England.
99. The grant (or copy grant) to be sealed and the copy to be deposited in the registry must include copies of all testamentary papers admitted to probate.
100. When application to seal a probate or letters of administration is made after the lapse of three years from the death of the deceased the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may think fit.
101. Special or limited or temporary grants are not to be sealed without an order of one of the registrars.
102. Notice of the sealing in England of a grant is to be sent to the court from which the grant issued.
103. When intimation has been received of the resealing of an English grant, notice of the revocation of, or any alteration in such grant is to be sent to the court by whose authority such grant was resealed.
104. The affidavit for Inland Revenue pursuant to the Customs and Inland Revenue Acts, 1880 and 1881 (*now Finance Act, 1894*), shall be transmitted to the Commissioners of Inland Revenue as if the person who applied for sealing under the Colonial Probates Act, 1892, were a person applying for probate or letters of administration.
105. The affidavit for Inland Revenue and accounts and schedules forming part thereof shall be in such form as may be prescribed by the Commissioners of Her Majesty's Treasury.

*Certificate under Finance Act, 1894*

106. The certificate required to be given by the proper officer of the court under s. 30 of the Customs and Inland Revenue Act, 1881, shall, for the purposes of the Finance Act, 1894, and subject to any necessary variations and modifications, which the officer of the court is hereby authorised at his discretion to make, be in the form following—

And it is hereby certified that an affidavit for Inland Revenue has been delivered, wherein it is shown that the gross value of the personal estate of the said deceased within the United Kingdom (exclusive of what the deceased may have been possessed of or entitled to as a trustee and not beneficially) amounts to £           , and that it appears by a receipt signed by an Inland Revenue officer on the said affidavit that £            for Estate Duty and interest thereon has been paid, the duty being charged at the rate of £            per cent.

*Resealing Irish Cases*

107. In any case in which it is intended to apply for the resealing in Ireland of any grant of probate or letters of administration made in the Probate Division of the High Court of Justice in England, the executor or administrator may deposit in the principal or district probate registry where the grant has been made a copy of such grant of probate or letters of administration, together with the original and any certificate or certificates that may be required, and the fees payable in Ireland in respect of such resealing, and the registrar shall transmit by post the documents so deposited, together with such fees to the registrar of the principal probate registry in Ireland, for the purpose of such grant being resealed under the provisions of 20 & 21 Vict., c. 79, s. 94.
108. The registrar of the principal probate registry in England shall, upon receiving by post from a probate registry in Ireland any grant of probate or letters of administration made in the Probate and Matrimonial Division of the High Court of Justice in Ireland, together with a copy thereof, and any certificate or certificates that may be required, and the fees payable in England in respect of the resealing of an Irish grant, cause such grant to be resealed in conformity with the provisions of 20 & 21 Vict., c. 79, s. 95 (*read now 15 & 16 Geo. 5, c. 49, s. 169 in respect of deaths after March, 1923*), and shall transmit the grant so resealed to the registrar of the probate registry in Ireland from whom it was received.

*Rule under Land Transfer Act*

109. All Rules, Orders, and Instructions, and the existing practice of the court with respect to non-contentious business shall so far as the circumstances of each case will allow be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897.

*Additional Rules and Orders of 1925**Trust Corporation*

111. Where application is made for probate or administration by a trust corporation other than the Public Trustee the officer appointed by the corporation for such purpose shall in every case lodge in the registry a sealed copy of the resolution appointing him, and shall depose, in the oath to lead the grant, that the corporation is a trust corporation within the meaning of s. 161 of the Supreme Court of Judicature (Consolidation) Act, 1925, and shall further depose in what manner the said corporation has been duly authorised to apply for the grant by the persons entitled thereto.

No surety shall be required from a trust corporation having its principal office within the jurisdiction, unless the registrar shall so direct.

*Retraction*

112. Where an executor, who has renounced probate, applies for leave of the court to withdraw his renunciation, after a grant has been made, he shall lodge such grant with the papers on motion. When leave to withdraw a renunciation has been granted, a notation of the subsequent probate shall be made upon the original grant and the record thereof; or, in the event of the original grant not being available, upon the record, and the grant when so noted shall be retained in the registry unless the court shall otherwise direct.

104. See Principal Registry Rule 111.

105. See Principal Registry Rule 112.

*Life Interest or Minority*

113. In every oath to lead a grant of administration, with or without the will annexed, the deponent shall state whether there is a life interest or a minority, and the registrar may call for such further evidence as he may require.

*Power Reserved*

114. Where there are more than four executors who have not renounced and are competent to take probate, the grant will bear a notation that power is reserved to the other executors to apply on vacancies occurring.

*Substituted Administrator*

115. Applications under s. 160 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, shall be by way of summons before the registrar supported by the affidavit of the applicant together with such further evidence, if any, as the registrar may direct. The original grant may be noted with the appointment of the substituted administrator, or administrators, or may be impounded, or revoked, as the circumstances of the case may require, or as the registrar may direct.

The original grantee, if he is not the applicant, shall be served with the summons unless the registrar shall otherwise require.

*Grants Limited as to Property*

116. Where the deceased died on or after the 1st January, 1926, and application is made to take a separate grant of the real estate or any part thereof, or of the

106. See Principal Registry Rule 113.

107. See Principal Registry Rule 114.

108. See Principal Registry Rule 115.

109. See Principal Registry Rule 116.

personal estate (not being trust estate), the Oath shall state that the deceased died solvent. The renunciation, in respect of that part of the estate, of all persons first entitled to a general grant, must be filed, and so in like manner in respect of a grant of trust property only.

*Absence from Realm*

117. Where the deceased died on or after the 1st January, 1926, applications under s. 164 of the Supreme Court of Judicature (Consolidation) Act, 1925, shall be made upon motion to the court, and the court may require notice to be given to persons having a prior right to a grant or to such other persons as it may think fit.

A grant under this section may be limited as regards time or portion of the estate or otherwise as the court may think fit.

*Settled Land*

118. In every oath to lead a grant of probate or administration (with or without will annexed) where the deceased died on or after the 1st January, 1926, the deponent shall swear to the best of his knowledge information and belief whether there is land vested in the deceased which was settled previously to his death and not by his will and the trustees, at the date of death, of such settled land, if any, shall be cleared off before a general grant shall issue.

A general executor or person entitled to a full grant may take a grant save and except settled land.

110. See Principal Registry Rule 117.

111. See Principal Registry Rule 118.



*Priority to Grant in Testacies*

119. Where the deceased died on or after the 1st January, 1926, leaving a will, the priority of right to a grant of probate or administration with the will annexed shall be as follows—
1. Executors.
  2. Residuary legatees or devisees in trust.
  3. Residuary legatees or devisees for life.
  4. Ultimate residuary legatees, or, where the residue is not wholly disposed of, the persons entitled upon an intestacy.
  5. The legal personal representatives of persons indicated in 4.
  6. Legatees or devisees, or creditors.
  7. Contingent residuary legatees or devisees, or contingent legatees or devisees, or persons, having no interest in the estate, who would have been entitled to a grant had the deceased died wholly intestate.
  8. The Crown.

*Priority to Grant in Intestacies*

120. Where the deceased died on or after the 1st January, 1926, wholly intestate, the priority of right to a grant of administration shall be as follows—
1. Husband or wife.
  2. Children, or other issue of deceased taking *per stirpes*.
  3. Father or mother.
  4. Brothers and sisters of the whole blood, or the issue of deceased brothers and sisters of the whole blood, taking *per stirpes*.
  5. Brothers and sisters of the half blood, or the issue of deceased brothers and sisters of the half blood, taking *per stirpes*.
  6. Grandparents.

112. See Principal Registry Rule 119.

113. See Principal Registry Rule 120.

7. Uncles and aunts of the whole blood, or the issue of deceased uncles and aunts of the whole blood, taking *per stirpes*.
  8. Uncles and aunts of the half blood, or the issue of deceased uncles and aunts of the half blood, taking *per stirpes*.
  9. The Crown.
  10. Creditors.
- Selection of Administrator*
121. Upon the making of a grant, live interests will be preferred to dead interests; and, in the case of conflicting claims, the nearer interest will be preferred to the more remote, unless the registrar shall otherwise direct.
- Joint Grants*
122. Where it is sought to join, with a person entitled to a grant, a person not equally or next entitled, all persons with a prior right must be cleared off by renunciation or by a registrar's order on summons for a joint grant.
- Commissioners' Fees*
123. Notwithstanding anything in the Order dated the 11th February, 1874, as to the costs to be allowed to proctors, solicitors and attorneys practising in non-contentious business, the following items may be allowed on taxation of costs in non-contentious business as disbursements made to Commissioners for Oaths—
- |   |       |
|---|-------|
|   | s. d. |
| For each oath administered to each deponent by a Commissioner for Oaths .   | 2 0   |
| For each exhibit referred to in the affidavit and required to be marked .   | 1 4   |
| For each obligor to a Bond the execution of which has been superintended and attested by a Commissioner for Oaths . | 2 0   |
114. See Principal Registry Rule 121.
  115. See Principal Registry Rule 122.
  116. See Principal Registry Rule 123.



## APPENDIX III

### THE SUPREME COURT (NON-CONTENTIOUS PROBATE) FEES ORDER, 1928

DATED 21ST DECEMBER, 1928, AS AMENDED BY THE SUPREME COURT (NON-CONTENTIOUS PROBATE) FEES ORDERS, 1930 AND 1933

The Lord Chancellor, the Judges of the Supreme Court, and the Treasury, in pursuance of the powers and authorities vested in them respectively by section 213 of the Supreme Court of Judicature (Consolidation) Act, 1925, and sections 2 and 3 of the Public Offices Fees Act, 1879, do hereby, according as the provisions of the above mentioned enactments respectively authorise and require them, make, advise, consent to, and concur in, the following Order—

1.—(1) In this Order—

“The Principal Registry” means The Principal Probate Registry of the High Court of Justice:

“District Registry” means District Probate Registry of the High Court of Justice:

“The Judicature Act, 1925,” means the Supreme Court of Judicature (Consolidation) Act, 1925:

“A folio” means a folio of 90 words.

(2) The Interpretation Act, 1889, shall apply for the purposes of this Order in like manner as it applies to an Act of Parliament.

2. The fees and percentages set out in the second column of Schedule I to this Order shall be taken in the Principal and District Registries in non-contentious Probate Business in respect of the items set out in the first column of the said Schedule, in accordance with and subject to any directions contained in that Schedule.

3. The fees and percentages set out in the second column of Schedule II to this Order shall be taken in the Principal and District Registries in the Department for Personal Applications in non-contentious Probate Business in respect of the items set out in the first column of the said Schedule, in addition to the fees taken under Schedule I to this Order, in accordance with and subject to any directions contained in those Schedules.

4.—(1) In the Principal Registry the fees prescribed by this Order, with the exception of Fee No. 45 in Schedule I to this Order, shall be taken by stamps, which shall be of the character prescribed in the third column of Schedules I and II to this Order.

(2) In the District Registries the fees shall be taken in cash.

(3) Fee No. 45 in Schedule I to this Order (which relates to notification of a charitable bequest) shall be taken in cash in such manner and at such times as the Treasury may direct.

(4) Fee No. 2 in Schedule I (which relates to small estates) when taken by an officer of Customs and Excise, and Fee No. 2 in Schedule II (which relates to small intestate estates) when taken by an officer of a County Court, shall be taken in cash.

5. The Orders and parts of Orders described in Schedule III are hereby revoked.

6. This Order may be cited as the Supreme Court (Non-Contentious Probate) Fees Order, 1928, and shall come into operation on the 1st day of January, 1929.

Dated this 21st day of December, 1928.

*Hailsham, C.  
Hewart, C. J.  
Hanworth, M. R.  
Merrivale, P.*

*Titchfield.* }  
*F. George Penny.* } Lords Commissioners of His  
Majesty's Treasury.

*Schedule I*

First Column	Second Column	Third Column
Item	Fee	Character of Stamp
<i>Grants</i>		
1. On Probates or Letters of Administration with or without the Will annexed:—		
If the net personal estate is sworn to be—		
Under the value of		
£	£ s. d.	
200 . . . . .	0 15 0	} Impressed
300 . . . . .	1 0 0	
450 . . . . .	1 10 0	
600 . . . . .	1 15 0	
800 . . . . .	2 0 0	
1,000 . . . . .	2 10 0	
1,500 . . . . .	3 10 0	
2,000 . . . . .	4 10 0	
3,000 . . . . .	5 0 0	
4,000 . . . . .	5 10 0	
5,000 . . . . .	6 0 0	
6,000 . . . . .	6 5 0	
7,000 . . . . .	6 10 0	
8,000 . . . . .	6 15 0	
9,000 . . . . .	7 0 0	
10,000 . . . . .	7 10 0	
12,000 . . . . .	8 0 0	
14,000 . . . . .	8 5 0	
16,000 . . . . .	8 10 0	
18,000 . . . . .	8 15 0	
20,000 . . . . .	9 10 0	
25,000 . . . . .	10 0 0	
30,000 . . . . .	10 10 0	
35,000 . . . . .	11 10 0	

First Column	Second Column	Third Column
Item	Fee	Character of Stamp
<i>Grants—contd.</i>		
1. On Probates or Letters, &c.— <i>contd.</i>		
£	£ s. d.	
40,000 . . . . .	12 10 0	} Impressed
45,000 . . . . .	13 10 0	
50,000 . . . . .	14 10 0	
60,000 . . . . .	16 0 0	
70,000 . . . . .	18 0 0	
80,000 . . . . .	20 0 0	
90,000 . . . . .	22 0 0	
100,000 . . . . .	24 0 0	
120,000 . . . . .	26 0 0	
140,000 . . . . .	28 0 0	
160,000 . . . . .	30 0 0	
180,000 . . . . .	32 0 0	
200,000 . . . . .	34 0 0	
250,000 . . . . .	37 0 0	
300,000 . . . . .	40 0 0	
350,000 . . . . .	43 0 0	
400,000 . . . . .	46 0 0	
500,000 . . . . .	50 0 0	
For every additional £100,000 or any fractional part of £100,000 a further and additional fee of . . . . .	5 0 0	
<i>Note</i> —This fee is not payable where any of the following fees is payable, viz. :—		
(a) Fee No. 2 in this Schedule (relating to certain estates not exceeding £500);		
(b) Fee No. 3 in this Schedule (relating to certain estates of soldiers and sailors); and		
(c) Fee No. 2 in Schedule II (relating to certain estates not exceeding £100).		
2. On Probates or Letters of Administration where the gross real and personal estate does not exceed £500 and application is made under section 33 of the Customs and Inland Revenue Act, 1881, as extended by section 16 of the Finance Act, 1894 . . . . .	0 15 0	Impressed
<i>Note</i> 1.—This fee includes any services rendered in the Personal Application Department.		

First Column	Second Column	Third Column
Item	Fee	Character of Stamp
<i>Grants—contd.</i>		
<p><i>Note 2.</i>—Where this fee is taken by an officer of Customs and Excise, it is to be taken in cash, and remitted to the Principal or District Probate Registrar in cash.</p>		
3. On Probates or Letters of Administration in respect of the estate of a soldier or sailor in cases where the estate is exempt from duty . . . . .	£ s. d.  0 15 0	Impressed
<i>Subsequent Grants</i>		
4. For any second or subsequent grant in respect of the same deceased person—		
(a) If the fee or each fee previously paid was less than £1-1-0 . . . . .	The same fee as on the previous grant.	Impressed
(b) If the second or subsequent grant is a general grant preceded only by a grant or grants limited to settled land . . . . .	Fee No. 1, 2 or 3 whichever is applicable.	Impressed
(c) In any other case . . . . .	1 1 0	Impressed
<i>Note.</i> —In cases (a) and (c) the fee is payable in addition to any further <i>ad valorem</i> fee due by reason of additional estate.		
5. For every duplicate and triplicate Probate, or Letters of Administration with or without the Will annexed . . . . .	1 1 0	Impressed
<i>Settled Land Grants</i>		
6. For a grant limited to settled land . . . . .	1 1 0	Impressed
<i>Grants Pendente Lite and Ad Colligenda</i>		
7. For a grant of administration <i>pendente lite</i> or <i>ad colligenda</i> . . . . .	Fee No. 1, 2, 3 or 4 whichever is applicable	Impressed
<i>Resealing. (Principal Registry only.)</i>		
8. For resealing a grant under the Colonial Probates Act, 1892 . . . . .	1 5 0	Impressed
9. For resealing a Northern Irish Grant . . . . .	1 5 0	Impressed

First Column	Second Column	Third Column
Item	Fee	Character of Stamp
<i>Resealing. (Principal Registry only)—cont.</i>		
10. For resealing a Northern Irish Grant made under section 16, Finance Act, 1894, and forwarded under section 169 (2) Judicature Act, 1925 . . . . .	£ s. d. 0 2 6	Impressed
<i>Note.</i> —Fees Nos. 9 and 10 are applicable to the whole of Ireland if the death was prior to 22nd November, 1921, and if the grant was prior to 1st April, 1923.		
11. For resealing a Scotch Confirmation . . . . .	1 5 0	Impressed
12. For resealing a Scotch Confirmation under section 168 (3) Judicature Act, 1925; or under section 34 Customs and Inland Revenue Act, 1881; or under section 16 Finance Act, 1894 . . . . .	0 2 6	Impressed
<i>Alterations in Grants, &amp;c.</i>		
13. For noting on a grant that the deceased died domiciled in England, if not so noted when the grant was issued (inclusive fee) . . . . .	0 12 0	Adhesive
14. For amending a grant (including Registrar's Order, etc.) . . . . .	0 10 0	Adhesive
And in addition, if a new bond is required . . . . .	0 2 0	Adhesive
15. For revocation of a grant (including Registrar's Order, etc.) . . . . .	0 15 0	Adhesive
16. For impounding a grant, or releasing an impounded grant (inclusive fee) . . . . .	0 12 0	Adhesive
17. For noting a reswearing of value and certificate of security (inclusive fee) . . . . .	0 12 0	Adhesive
18. For noting on a grant and the record the addition of a personal representative (including filing the affidavit) . . . . .	0 5 0	Adhesive
19. For noting on record of grant that an executor to whom power was reserved has renounced (inclusive fee) . . . . .	0 7 6	Adhesive
<i>Caveats</i>		
20. For the entry or subduction of a caveat . . . . .	0 1 0	Adhesive
21. For a warning to a caveat at the Principal Registry . . . . .	0 2 6	Adhesive
22. For service of warning by post from Principal Registry . . . . .	0 2 6	Adhesive



First Column	Second Column	Third Column
Item	Fee	Character of Stamp
<i>Caveats—contd.</i>		
	£ s. d.	
23. For notice of subduction or of warning at the Principal Registry, sent to the District Registry in which the caveat was entered . . . . .	0 1 0	Adhesive
<i>Citations and Advertisements</i> (Principal Registry)		
24. For settling abstract of citation for advertisement, or other advertisement . . . . .	0 10 0	Impressed
25. For settling and sealing a citation (inclusive fee) . . . . .	0 10 0	Impressed
<i>Deposit of Wills</i>		
26. For depositing a Will of a deceased person in a probate registry for safe custody:—		
On renunciation of executor (inclusive fee) . . . . .	0 15 0	Adhesive
Further fee if deposited in a District Registry . . . . .	0 5 0	Adhesive
27. For obtaining a Will brought in on subpoena—on application for grant . . . . .	0 5 0	Adhesive
28. For depositing, in the Principal Registry, the Will of a living person for safe custody (inclusive fee) . . . . .	0 15 0	Adhesive
Further fee if deposited through a District Registry . . . . .	0 5 0	Adhesive
<i>Searches and Inspection</i>		
29. For search for a document filed in a Probate Registry, including inspection of the registered copy of the Will or the original Will (if unregistered) or any other document . . . . .	0 1 0	Impressed
30. For inspecting an original Will that has been registered—in addition to the fee for search . . . . .	0 1 0	Impressed
31. For a search for a Will or Letters of Administration or other document on behalf of the party applying (whether in person or by letter)—in addition to Fees Nos. 29 and 30:—		
For the search, for every year or part of a year . . . . .	0 0 6	Impressed

First Column	Second Column	Third Column
Item	Fee	Character of Stamp
<i>Searches and Inspection—cont.</i>	£ s. d.	
For reading the document to the applicant, if required:—		
For every 20 folios or part of 20 folios . . . . .	0 1 0	Impressed
<i>Note.</i> —Searches are not made on behalf of persons applying by letter for more than 5 years from the alleged date of death.		
<i>Copies</i>		
32. For a photographic copy or extract of a will deposited in the Principal Probate Registry:—		
For each sheet photographed . . . . .	0 1 6	Adhesive
32A. For a photographic copy of probate or letters of administration issued by the Principal Probate Registry . . . . .	0 1 0	Adhesive
<i>Note.</i> —If the copy is to be sealed with the small seal of the court, no further fee is payable for the seal.		
33. For a type-written copy or extract of a document filed or deposited in a Probate Registry:—		
Where the document is under 200 years old—		
For 5 folios or under . . . . .	0 2 6	Adhesive
For every additional folio or part of a folio . . . . .	0 0 6	Adhesive
Where the document is 200 years old—		
For 5 folios or under . . . . .	0 5 0	Adhesive
For every additional folio or part of a folio . . . . .	0 0 9	Adhesive
34. If the document or part of the document is copied <i>facsimile</i> , in addition to Fee No. 33:—		
If 2 folios <i>facsimile</i> or under . . . . .	0 1 0	Adhesive
For every additional folio or part of a folio . . . . .	0 0 6	Adhesive
35.—(i) For collating a copy with the original document, including the Registrar's certificate in verification thereof:—		
If 10 folios or under . . . . .	0 2 6	Adhesive

First Column	Second Column	Third Column
Item	Fee	Character of Stamp
<i>Copies—cont.</i>		
For every additional folio . . . . .	£ s. d. 0 0 3	Adhesive
and, in addition, if there is any pencil writing copied or any part thereof is <i>facsimile</i> .		
If 2 folios or under . . . . .	0 0 6	Adhesive
For every additional folio or part of a folio . . . . .	0 0 3	Adhesive
	This fee is not payable on a photographic copy.	
(ii) For the Registrar's certificate in verification of a photographic copy . . . . .	0 2 6	Adhesive
36. For impressing the seal of the Court on a copy . . . . .	0 5 0	Adhesive
<i>Note.</i> —This fee is not payable for impressing the small seal of the Court on an uncertified photographic copy of probate or letters of administration.		
37. For copies of plans, drawings, armorial bearings, &c. . . . .	Such fee as shall be determined by the Registrar in each case.	Adhesive
38. For an exemplification, in addition to the fees for engrossing and collating . . . . .	1 1 0	Impressed
39. For engrossing and collating wills, &c. :—		
If 3 folios or under . . . . .	0 4 6	Adhesive
For every additional folio . . . . .	0 1 6	Adhesive
40. For examining and sending by post a plain copy of a Will . . . . .	0 0 6	Adhesive (in Correspondence Department, Impressed)
<i>Commissioners' Fees</i>		
41.—(i) On administering an oath, for each deponent . . . . .	0 2 0	Adhesive
(ii) For marking each exhibit . . . . .	0 1 4	Adhesive
<i>Note.</i> —This fee is not payable where Fee No. 4 in Schedule II is payable.		

First Column	Second Column	Third Column
Item	Fee	Character of Stamp
<i>Commissioners' Fees—cont.</i>		
42. For superintending and attesting execution of a bond: by each obligor . . .	£ s. d. 0 2 0	Adhesive
<i>Note.</i> —This fee is not payable where Fee No. 5 in Schedule II is payable.		
<i>Miscellaneous</i>		
43. For attendance with books or documents in any Court of Law, or elsewhere: for each day or part of a day (in addition to necessary expenses) . . .	2 0 0	Impressed
44. For producing, in the Registry, a Will to be photographed . . .	1 1 0	Impressed
45. For notification by the Principal Registry to a charitable institution of a bequest in its favour, and forwarding extract . . .	0 10 6	
46. For taxing a bill of costs in the Principal Registry, inclusive of the Registrar's certificate . . .	The same fees as are payable in an action.	Impressed
47. For a summons, order on summons, motion, and order on motion . . .	The same fees as are payable in an action.	Impressed
48.—(i) For a Registrar's order . . .	0 2 6	Adhesive
(ii) For filing a document . . .	0 2 6	Adhesive
(iii) For a certificate or minute under the hand of a Registrar or Judge . . .	0 2 6	Adhesive
<i>Note.</i> —This fee is not payable where the order, the filing, or the certificate or minute, is included in a proceeding for which another fee is payable.		
49. For Registrar's Fiat on refusing Probate (inclusive fee) . . .	0 7 6	Adhesive
50. For perusing and settling oaths, affidavits or other documents:—		
For any one document settled . . .	0 5 0	Adhesive
For any number of additional documents in the same case, a further inclusive fee of . . .	0 5 0	Adhesive

First Column	Second Column	Third Column
Item	Fee	Character of Stamp
<i>Correspondence in District Registries</i>		
51. For receiving an application for a grant (including cases under section 33 of the Customs and Inland Revenue Act, 1881, and section 16 of the Finance Act, 1894), through the post in a District Registry or where the Inland Revenue Affidavit has not been controlled, and for correspondence with reference to the same; <i>Note.</i> —District Probate Registrars will forward the Revenue Affidavit to the Estate Duty Office if desired.	Ten per cent on the <i>ad valorem</i> fee applicable to the estate. Minimum fee, 5s. Maximum fee, £2.	
52. For correspondence on any other application in respect of which any fee in this Schedule (except Fees Nos. 29 to 40 for searches and copies) is payable	0 3 6	

*Schedule II*

## FEES IN RESPECT OF PERSONAL APPLICATIONS

First Column	Second Column	Third Column
Item	Fee	Character of Stamp
1. On Probates or Letters of Administration with or without Will annexed; or Double or Cessate Probates; or Letters of Administration (with or without Will annexed) de bonis non or cessate, or on resealing a grant under the Colonial Probates Act, 1892:—		
If the net personal estate is sworn to be—		
Under the value of—		
£	£ s. d.	
5 . . . . .	0 10 0	} Impressed
20 . . . . .	0 12 6	
100 . . . . .	2 0 0	
200 . . . . .	2 5 0	
300 . . . . .	2 10 0	
450 . . . . .	2 10 0	
600 . . . . .	2 15 0	
800 . . . . .	3 0 0	
1,000 . . . . .	3 10 0	
1,500 . . . . .	4 0 0	
2,000 . . . . .	4 10 0	
Of the value of £2,000 or over . . . . .	The same fee as would be payable for a grant of probate under Fee No. 1 in Schedule I.	
<p><i>Note 1.</i>—This fee is not payable where any of the following fees is payable:—</p> <p>(a) Fee No. 2 in Schedule I (relating to certain estates not exceeding £500);</p> <p>(b) Fee No. 3 in Schedule I (relating to certain estates of soldiers and sailors); and</p> <p>(c) Fee No. 2 in this Schedule (relating to certain estates not exceeding £100).</p> <p><i>Note 2.</i>—Where this fee is payable, it is payable in addition to Fee No. 1 in Schedule I; and also in addition to Fee No. 4 in Schedule I where that fee is payable.</p>		

First Column	Second Column	Third Column
Item	Fee	Character of Stamp
<i>Small Intestate Estates</i>		
2. On Letters of Administration of the estate of an intestate granted to his widow and/or one or more of his children, or to one or more of the children of an intestate widow:—	£ s. d.	
If the gross personal estate is sworn—		
Not to exceed in value £20 . . .	0 5 0	} Impressed
" " " £30 . . .	0 6 0	
" " " £40 . . .	0 7 0	
" " " £50 . . .	0 8 0	
" " " £60 . . .	0 9 0	
" " " £70 . . .	0 10 0	
" " " £80 . . .	0 11 0	
" " " £90 . . .	0 12 0	
" " " £100 . . .	0 13 0	
<i>Note.</i> —Where the application is made to a County Court under the Intestate Estates Acts, 1873 and 1875, this fee is to be taken in the County Court in cash, a moiety being retained in the County Court and a moiety being remitted by the County Court Registrar to the Principal or District Probate Registrar in cash.		
<i>Duplicate and Triplicate Grants</i>		
3. On every duplicate or triplicate grant of probate or letters of administration, with or without the Will annexed, or Probate of Codicil to Will already proved, or Letters of Administration (with same annexed):—		
If the net personal estate is sworn to be—		
Under the value of £450 . . .	0 15 0	Impressed
Of the value of £450 or over . . .	1 0 0	Impressed
<i>Oaths, &amp;c., other than those to lead grant</i>		
4.—(i) On administering oaths, other than those included in the foregoing fees, each deponent . . .	0 2 0	Impressed
(ii) For marking each exhibit . . .	0 1 4	Impressed
<i>Bonds</i>		
On giving additional security, for preparing and attesting a new bond and looking up former bond . . .	1 0 0	Impressed
6. On preparing any affidavit or document to lead a Registrar's Order . . .	0 5 0	Impressed

*Schedule III*

The Order dated 8th August, 1873, as to Fees to be taken in the Principal Registry and District Registries of the Court of Probate and by the Registrars of County Courts under the Act 36 & 37 Vict., c. 52.

The part of the Order dated 11th February, 1874, as to Additional Fees to be paid on Personal Applications for Grants of Probate or Letters of Administration in the Principal and District Probate Registries.

The Order as to Fees to be taken on and after the 2nd day of March, 1874, in the Principal Registry, and the District Registries of the Court of Probate in Non-Contentious Business.

The order dated 20th July, 1875, as to the application of the Rules and Orders of August 8, 1873, to grants under the Act 36 & 37 Vict., c. 52, as extended by the Act 38 & 39 Vict., c. 27.

The Order dated the 12th December, 1892, as to the Fees to be taken in the Principal Probate Registry under the Colonial Probates Act, 1892.

The Supreme Court (Non-Contentious Probate) Fees Order, 1926.





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